mon; and concluded that neither on policy nor on language could the authorization to the Secretary in the 1936 Act to withdraw "public lands" for reservations be extended to open ocean waters. Further, the court held that Paragraph 208.23(r) is not otherwise valid as a conservation measure, and was a plain violation of the antimonopoly provisions of the White Act. Finally, it held that the Secretary of the Interior was not a necessary party (R. 499-514).

On February 20, 1948, the petition for a writ of certiorari was filed, and on April 5, 1948, the writ was granted.

SUMMARY OF ARGUMENT

I.

Section 208.23(r), the regulation the validity of which is challenged in this case, is both unauthorized by and in violation of the White Act of 1924. That Act delegated great administrative discretion but limited it in two ways to prevent abuse: that the regulations must be for the *purpose* of conservation and that they must not have the *effect* of creating any exclusive rights of fishery or preventing any citizen from fishing in any area where fishing is permitted. The challenged regulation violates both limitations.

A. The regulation is directly in conflict with the specific prohibitions of Section 1 of the White Act—prohibitions which were of the essence of the Act. This regulation creates an exclusive right of fishery; it denies to citizens of the United States the right to take fish in waters in which fishing is permitted; it is not a regulation of general application. Petitioner's attempts to evade the prohibitions by arguments as to interpretation fail not only on the language of the Act

NO. 24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner*,

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, McNEILL & LIBBY, FRANK McCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., AND UGANIK FISHERIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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October, 1948.

but also on both the legislative history and the so-called "administrative interpretation" of the Act. His argument, finally, that the White Act was repealed, *pro tanto*, by a casual technical amendment of the Indian Reorganization Act in 1936 is unsound almost to the point of absurdity.

B. The challenged regulation is also invalid in that it effects no conservation purpose; it neither prohibits nor limits fishing nor does it limit the means of fishing or the quantity of fish caught. It is patently only a device to enforce the alleged Karluk Indian Reservation. *Hale* v. *Bimco Trading Co.*, 306 U. S. 375. Consequently, the drastic conservation sanctions of the White Act may not be incorporated into another statute and used for a wholly different purpose. *L. P. Steuart & Bro.* v. *Bowles*, 322 U. S. 398.

II.

Not only is the challenged regulation void, but Public Land Order 128 is also void to the extent that it purports to include ocean waters in the Karluk Reservation. Of course, if subsection 208.23(r) is invalid and in conflict with the White Act in any event, the validity *vel non* of the reservation need not be determined. On the other hand, petitioner must necessarily also prove that the reservation itself is valid in order to prevail. For many reasons that proof is impossible.

A. The words "public lands" used in Section 2 of the Act of May 1, 1936 have never been construed to include ocean waters and cannot be so construed here. Petitioner fails to show that the uniform construction of the words "public lands" should be modified in a statute dealing with Alaska.

B. The attempt by petitioner to claim that the ocean waters are an "area of land" within the meaning of the Acts of 1884 and 1891 referred to in the 1936 Act was not raised in the petition for certiorari or in the court below. It is not open here. Moreover, the language of the 1884 and 1891 Acts show that they could not possibly apply to ocean waters; they preserve rights to lands in Alaska "actually occupied" and contemplate ultimate acquisition of title, neither being applicable to ocean waters. Finally, the evidence relied upon by petitioner to demonstrate "actual occupation" is misleading and inaccurate; in fact the waters at Karluk here involved have been common fishing grounds for Russians, Americans and natives of other tribes in Alaska as well as natives of Karluk for almost a century and a half. Indeed, we believe that in the context of the 1936 Act the Secretary would not have authority over ocean waters and Indian reservations even if the language had been "lands" rather than "public lands". *Shively* v. *Bowlby*, 152 U. S. 1; *United States* v. *Holt* State Bank, 270 U. S. 49. The language of the 1936 Act and its legislative history distinguish it from *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, upon which petitioner principally relies.

III.

Petitioner's arguments that the District Court lacked jurisdiction are unsound. *Williams* v. *Fanning*, 332 U. S. 490, has made clear that the Secretary of the Interior is not an indispensable party to this action. Secondly, respondents are clearly entitled to equitable relief. Ex parte *Young*, 209 U. S. 123, 161.

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ARGUMENT

Alaska Fisheries Regulation 208.23(r), the enforcement of which has been enjoined, is one paragraph of comprehensive general regulations for the "protection of Alaska Commercial Fisheries". These Regulations are issued annually, by the Secretary of the Interior, pursuant to the White Act of 1924 (Appendix, *infra*).

The White Act is the organic law for the conservation of Alaska fisheries. Years of agitation preceded its passage, but for a quarter of a century it has been at once a sword and a shield for conservation. It confers on the Secretary the unprecedented power to issue *conservation* regulations, and to insure that conservation will be effected, it makes a violation of the regulations punishable not only by seizure and confiscation of boats, nets, gear and fish, but also by heavy fines and imprisonment. Further to insure conservation, powers of arrest and seizure are given to designated employees of the Fish and Wildlife Service of the Interior Department.

The sword is potent, but the shield, against abuse of this power, is equally great. The White Act does not rely solely on judicial relief from possible abuse of the sweeping power which it had granted; Congress also inserted in the White Act several specific prohibitions and limitations to which all regulations must conform.

Basically, the issue before the Court is whether these limitations, inserted into the White Act as limits on the Secretary's power, can be evaded or ignored.

The first aspect of this basic issue is the attempted avoidance of specific White Act prohibitions. That phase of the issue is: can a White Act regulation ignore the specific statutory prohibition against the creation of monopolies over fishing rights in an area; against the denial to any citizen of the right to fish wherever fish

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ing is permitted (*cf. Freeman v. Smith*, 44 F. (2d) 703, 704 (C. C. A. 9, 1930)); and against regulations not general in character. We say, simply, of course not; the *limitations and prohibitions* of the White Act cannot be ignored and violated as they have been in this case. This is Point IA of our brief.

The second aspect of that basic issue is the attempted use of a *conservation* power to enforce a wholly different statute. Specifically: may a Federal official indirectly make effective the purported creation of an Indian reservation in ocean waters by the use of a regulation issued under the White Act, with its drastic sanctions designed to conserve Alaskan fisheries. We say, simply, that the *conservation* purpose of the White Act cannot be ignored—that a Federal official may not utilize the criminal and forfeiture sanctions of the White Act to enforce an administrative determination made under a completely separate enactment and for a completely different purpose. This is Point IB of our brief.

If either of these aspects of the basic issue is decided in favor of respondents, there is no need to reach the question whether the purported "reservation" in ocean waters is valid. We fully agree with the courts below that it is not, and we believe that on this basis, too, petitioner must fail. This is fully discussed in Point II of our brief.

Before we come to those issues, however, a word is warranted to put this case in proper historical perspective. Since 1943, the Department of the Interior has endeavored to *obtain* for the Karluk natives in Alaska *exclusive* rights to the *commercial* fisheries of an area about 15 miles long and half a mile wide in Shelikof Strait, off Kodiak Island, Alaska. We emphasize the word "obtain"; it is not an effort to "preserve", as

3. If both prior questions are decided against respondents, then: whether the Act of May 1, 1936, a minor, technical amendment to an earlier statute, granted to the Secretary of the Interior the authority to include ocean waters within the Karluk Reservation.

4. Whether the District Court properly granted the relief prayed.

STATUTES INVOLVED

The relevant portions of the statutes involved (Section 2 of the Act of May 1, 1936, c. 254, 49 Stat. 1250, U. S. C., Title 48, Sec. 358a; and Sections 1, 6, 7 and 8 of the Act of June 6, 1924 (White Act), c. 272, 43 Stat. 464, as amended, U. S. C., Title 48; Secs. 221 *et seq.*); of Public Land Order No. 128 of May 22, 1943 (8 F. R. 8557); and of Section 208.23 of the Alaska Fisheries Regulations (Title 50, C. F. R., 41 F. R. 3105 as amended by 11 F. R. 9528) are set out in the Appendix.

STATEMENT

Petitioner's statement of the case (Br. pp. 5-9) wholly ignores the findings of fact of the District Court. Under well-settled doctrine, those findings, have been approved by the court below, will not be further reviewed here. *United States v. O'Donnell*, 303 U. S. 501, 508. We summarize those findings in this Statement, and, at the appropriate points in the Argument *infra*, we will correct the misleading and frequently completely erroneous statements which the petitioner makes when he goes outside the record.

The District Court found that the seven respondents are corporations or business concerns appropriately qualified to do business in Alaska (R. 24-26). The petitioner, a resident of Juneau, Alaska, was at all relevant

The Order claimed as its foundation Section 2 of the Act of May 1, 1936 (Appendix, *infra*); the native residents of the land area voted their approval on May 23, 1944 (R. 32).[1] This reservation includes the waters described above in which respondents have fished for many years (R. 27, 29). From the creation of the reservation in 1944 respondents have challenged its validity and particularly the attempted inclusion of ocean waters (R. 32).

In 1946, Section 208.23(r) (Appendix, *infra*) of the Alaska Commercial Fisheries General Regulations was issued. This section closed to salmon fishing all the waters of the Karluk Reservation as established under Public Land Order 128 and added the following proviso:

> "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250)."

The regulation purports to be based on the White Act of 1924 (Appendix, *infra*), a measure for the conservation of the fisheries of Alaska. Section 6 of the White Act contains enforcement provisions, including seizure of boats, gear and equipment as well as criminal prosecution of violators. Under that Act petitioner has been properly authorized to make those arrests and seizures (R. 33-34).

Since publication of Section 208.23(r) of the Commercial Fisheries Regulations, petitioner has continually threatened, except as restrained by the court below, to seize the fish, boats and gear of respondents utilized in fishing in the Karluk waters (R. 26-27, 34).

[1] The vote (R. 462) was 46 for, 0 against, with 11 eligible voters absent. In all, 57 adult Indians are concerned in the reservation.

petitioner's brief would suggest: At Karluk, for example, *both* Karluks and non-Karluks have fished in the ocean waters now sought to be reserved since before 1880 (see pp. 51-60, *infra*). We emphasize "exclusive"; what was for over a century and a half a fishing area open to all (subject to conservation regulations) is now sought to be made a monopoly area for the Karluks, where they may fish, and may sell others permission to fish, as they see fit. We also emphasize "commercial" fisheries; the case does not involve fishing for food, as petitioner implies. The right of Karluk natives to fish for personal or family use has never been challenged, and continues wholly unrestricted.

In 1943, the Department hit upon a minor 1936 amendment to the Wheeler-Howard Indian Reorganization Act, as an alleged basis for creating a Karluk Reservation, and including in it not only 35,000 acres of upland, but also this large segment of ocean waters. Some 57 adult Indians and their children were to be given permanent and exclusive proprietorship—to fish, or to sell permission to non-Karluk residents to fish, or both—over an area which yields many million of dollars worth of fish every season.

Respondents, as well as others, immediately challenged the validity of this attempt. For two seasons, no effort was made to enforce the alleged reservation, though some fishermen, to avoid argument, paid their tribute to the Karluk natives by purchasing permits. The proper remedies available to enforce any lawfully created Indian reservation—remedies which had been used by the Government before in a similar situation—were not invoked. *Cf. Alaska Pacific Fisheries v. United States*, 248 U. S. 78.

Instead the Department, to make this exclusive proprietorship in the Karluks effective, adopted the *in-*

terrorem methods of threatening respondents with the *conservation* sanctions of the White Act. It was that final course of conduct which forced respondents to seek and obtain injunctive relief.

I.

The Challenged Regulation Is Unauthorized and in Violation of the White Act.

The need for conservation control of the commercial fisheries of Alaska has been recognized since as early as 1906. In that year, Congress itself specified certain controls by the Act of June 26, 1906 (c. 3547, 34 Stat. 478-480)—that no fishing could be done within 500 yards of the mouth of any salmon stream, and that there should be weekly closings to fishing in certain waters.

During World War I, however, fishing expanded, and depletion was threatened. Several attempts to secure additional legislation failed. Finally, in 1922, the President, acting by Executive Order in the absence of statute, created in the Territorial waters two Fisheries Reservations, and in them gave the Secretary of Commerce power to control commercial fishing by regulations. Such regulations were issued; they closely restricted commercial fishing and in particular limited it to individuals and companies which had previously fished.

When, in 1924, Congress considered the bills which evolved into the White Act, these regulations and their administration were the principal area of controversy. See *Hearings on H. R. 2714 before the House Committee on Merchant Marine and Fisheries*, 68th Cong., 1st Sess., *passim*. It was urged that fishing permits had been issued for purposes unrelated to conservation, that

abuse of power, preferences and favoritism were not unknown, and that many citizens had been excluded from commercial fishing in Alaskan waters.

It was recognized, by 1924, that Congress could not follow the 1906 pattern and provide detailed conservation rules in the statute. A very considerable administrative discretion was necessary for conservation. This was conceded by all. The problem which Congress had to resolve in the White Act was how to provide enough administrative discretion to achieve necessary conservation and at the same time to forestall possible abuse. Debate centered on how, by limiting language, this discretion could be canalized within conservation purposes, and even within these limits controlled to make impossible the creation by regulations of any exclusive or monopolistic position for an individual or group.

The original bill (H. R. 2714) in 1924 sought simply to sanction and confirm the power exercised by the President's 1922 Executive Order. Fundamentally, the legislative history of the White Act demonstrates that this was *not* the course taken. Rather, Congress granted broad powers, provided many and stringent sanctions, but at the same time enacted explicit limitations on how these powers were to be exercised. The limitations are phrased both in terms of the *purpose*, *i.e.*, conservation, for which regulations may issue, and in terms of the *form and result* to which even conservation regulations must conform. Thus Congress, so far as language and intent can do it, specifically insured that every regulation issued under the White Act would be for conservation purposes, and in addition would be general in its application, would not afford to any individual or group any exclusive fishing rights, and would

not deny to any citizen the right to fish where sound conservation permitted fishing.

The challenged regulation violates every one of these precepts.

A. SECTION 208.22 (B) IS INVALID BECAUSE IT IS IN CLEAR VIOLATION OF THE SPECIFIC LIMITATIONS ENACTED IN SECTION 1 OF THE WHITE ACT.

Section 1 of the White Act requires, *inter alia*:

> "that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies; and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior."

That language has never been repealed or modified. It is not ambiguous. Yet it is at the heart of the Act, as its legislative history abundantly shows. It is clearly stated in the report of the House Committee (H. Rep. No. 357, 68th Cong., 1st Sess., p. 2):

> "At the present time it is the policy of the department as one means of control of fishing to grant a limited number of fishing permits within any designated area and to exclude all others from fishing rights therein. Your committee does not question the purpose of the department in this regard, but it has reached the unanimous and positive opinion that this practice of granting exclusive fishing privileges should cease and in this section it is declared that all regulations authorized to be made shall be of general application and that no exclusive or several right of fisheries shall be granted, nor shall any citizen be denied the right to take fish in waters where fishing is permitted

> This declaration of policy and prohibition of law was earnestly urged upon the committee by the Delegate from the Territory, Mr. Sutherland, and has the general support of the people of the Territory."

Senator White of Maine, author of the bill, stated (65 Cong. Rec. 5974):

> "The Committee inserted this provision in order to do away with that exclusive right of fishing and to insure to every citizen of the United States equality of right and equality of opportunity."

Measured against these requirements, the challenged regulation cannot stand. Plainly it is not of *general* application. Unless language has lost its meaning, this is a *special* regulation, of *special* application, relating to the Karluk natives. A more deliberate disobedience of the Congressional mandate would, indeed, be difficult to contrive: an area is first completely closed, and then the prohibition is lifted for the Karluk Reservation Indians and those others they may temporarily license for fees or on any other condition they care to impose.

Conversely, the regulation denies to citizens of the United States the right to take fish in waters in which fishing is permitted. The Court of Appeals for the Ninth Circuit, in *Freeman v. Shaith*, 44 F. (2d) 703 (1930), interpreted the White Act limitations in language which has been accepted for almost 20 years:

> "It will thus be seen that the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska, where fishing is permitted by the Secretary of Commerce, is guaranteed to every citizen of the United States without reservation, whether he be a resident of Alaska or not: * * *."

Here only Karluk Reservation Indians (and the others they may "authorize") may fish; all others are excluded.

Finally, the regulation necessarily results in the grant of an exclusive right of fishery. Indeed, a more perfect monopoly could not be devised than by a system which permits, in an area otherwise closed, one group alone to fish and to authorize others to fish on their own terms.

But we need not labor the point. Petitioner himself recognizes the necessary conflict with the statute, and devotes a major portion of his brief to numerous and inconsistent theories upon which he may avoid the plain violation of the prohibition. He succeeds only in demonstrating that Congress meant what it said.

1. *The argument on "governmental use".*—Petitioner's first attempt to evade the White Act prohibitions is by asserting, in effect, that they do not mean what they say. He says (Br. pp. 37-39) that the prohibitions do not apply to the Government, and that since a reservation of "public lands" for Indians is a proper Government act it is a "reservation of lands for governmental use". An analogy is drawn to a military reservation.

The misleading character of the argument is apparent from its mere statement. Petitioner begins by stating (Br. p. 37):

> "It was the view of the courts below that the White Act limited any action taken with respect to lands under water in Alaska."

With due deference, that was *not* the view of either lower court. Each held that the White Act limited action *by the Secretary of the Interior with respect to commercial fishing regulations* in Alaska (R. 54-59;

502-506). The courts did not hold, nor do we assert, that the White Act prohibitions prevent action by the President in setting up a naval base (assuming that he has statutory authority to set aside areas of land and water for such purposes). The White Act certainly does not prevent further legislation by Congress. Actually, a few sentences later, petitioner correctly limits the scope of the Act. He says (pp. 37-38):

> "It [the White Act] simply directed that in making fishing regulations authorized by the Act, the Secretary of Commerce should not discriminate among individuals."

The inhibition is now, of course, on the Secretary of the Interior, not the Secretary of Commerce, and the prohibited discrimination is among "citizens", but, in general, we agree that such is the scope of the Act. But that prohibited act *is exactly what the Secretary has done here:* he has, in making fishing regulations, permitted one group of citizens to fish, but forbidden others to do so. The regulation we are challenging is a fishing regulation, not a presidential proclamation or an act of Congress.

Nor does petitioner advance his argument by suggesting that the regulation may be sustained because the Secretary has a power and duty with respect to Indian reservations. This, of course, amounts to the assertion that the Secretary of the Interior may use powers given him subject to explicit limitations under one statute, and transplant them, without limitations, to another statute, under which the reservation was attempted to be created. That plainly may not be done, and is indeed a further basic objection to the regulation, which we set out in Point B, *infra*, pp.

We should add here, however, in order that our position be not misunderstood, that we do not deny that there may be overlapping prohibitions. If the United States creates a naval reserve in navigable waters and prohibits entry thereon, the prohibition against entry flows from the statute creating the naval reserve, and whatever sanctions are provided by *that* statute are of course available against the trespasser. But nothing in that situation means that the conservation sanctions of the White Act may be used to enforce the reserve, whether validly or invalidly created.

2. *The argument on legislative history of the White Act.*—The second variant of the argument that the White Act does not mean what it says is the attempt of the petitioner to argue that the legislative history of the White Act shows that "Indian fisheries" are not subject to the explicit limitations on the power of the Secretary to issue regulations (Br. pp. 39-46). We have grave doubts whether even the most explicit legislative history would warrant reading an exception into unqualified language, but we never reach that question.

Petitioner does not argue by adducing anything which says that there is an exception for "Indian fisheries" even remotely, but by inference from a series of facts, or assumed facts, which, separately or in concert, prove nothing of the sort.

Petitioner's argument of "government aid" would also seem to suggest that respondents should be viewed as if they were complaining of a discrimination between them, as citizens, and the Government. Patently, that is not the discrimination involved; it is a discrimination between Karluk natives (and their permittees) and all other citizens. The further difficulty that this is not a reservation of "public lands", but of ocean waters, which are vastly different, is dealt within Point II, *infra*.

We have already stated (pp. 13-14) in general the course of the legislative history. The Secretary of Commerce had set up "fishing reservations", from which all except those who secured permits were excluded. Few, except the favored permittees, liked that system. The permits were strictly limited, and were generally given to those who had fished in the "reservation" in prior years. The Alaska residents, Indian and non-Indian alike, and the non-residents of Alaska all joined in protest against a system which deprived them, in effect, of an equal opportunity to engage in commercial fishing. The Indians supported the successful attempt to abolish such special privileges, as petitioner correctly observes (Br. p. 12), but with no suggestion at any time that they sought to abolish one favored class in order themselves to become a favored class. They wanted the "equality" and "non-discrimination" clause so that they would have a chance to compete on equal terms. Petitioner refers to no statement in either the hearings or the committee reports in which it was claimed that the language of Section 1 of the White Act permitted new, Indian, exclusive fishery reservations. We say it advisedly; there is no such statement. The endorsement of the bill by the natives of Alaska does not prove—indeed does not even support an inference—that there was to be an exemption of "Indian fisheries" from the statutory limitation.

Petitioner next refers (Br. p. 49) to the fact that no one at the hearings challenged or protested the Annette Island Reservation, and that this reservation, which included fishing waters, was not abolished. Again, the fact will not support the inference. The Annette Island Reservation was lawfully created by a specific act of Congress. Act of March 3, 1891, Section 15, c. 561, 26 Stat. 1101. The "Metlakahtla Indians * * * and such

other Alaskan natives as may join them", as the statute phrased it, were given the exclusive fishing rights there, and all others were excluded, *not* by any regulation under the White Act, but by the provisions of the separate statute creating the reservation. See *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78. That Congress did not repeal a prior *statutory* reservation lends no support to the argument that it sanctioned administratively created reservations in the future.

Petitioner also asserts that Congress cannot be taken to have abolished other "native fishery reserves" where the Government had asserted exclusive control over ocean waters on behalf of the natives. The short answer is that there were none such. The Tyonek (or Moquawkie) Reservation, to which petitioner makes reference (Br. p. 40) includes no ocean waters or even tidelands, and makes no reference to Indians or Eskimos, or fishing, much less to any exclusive native rights of fishery. See Executive Order No. 2141, dated February 27, 1915.[3] The decision of the Solicitor of the Interior Department to which petitioner refers as showing a lease of cannery and fishing privileges (49 L. D. 592) is not concerned with the scope of the reservation, but only with whether there was a power in the Superintendent of Education to sign a lease. So far as can be inferred from the opinion, the Superintendent was primarily interested in leasing a cannery site; the fishing privileges, if there were any, referred to the Chuit River, which marked one boundary of the reservation. Commercial fishing in rivers, however, had been severely limited by statute since 1906. Act of

[3] The Order reads simply that the tract of land described "be and the same is hereby withdrawn from disposal, and reserved for the use of the U. S. Bureau of Education, subject to any existing vested rights."

June 26, 1906, c. 3574, 34 Stat. 478. The Hydaburg Reservation, which includes some water area (Exec. Order No. 1557) has never before, so far as respondents are aware, been asserted to be an exclusive fishery area for the Hydas.[1] We should add that nothing in the hearings suggests that Congress had ever heard of either reserve. They form no basis for the inference that Congress intended to have an "except for Indians" clause read into the prohibitions it enacted.

Petitioner next refers (Br. pp. 43-45) to the change in the language of the statutory prohibition during the committee consideration of the bill. He quotes (p. 43) a proviso to the statutory limitations in one of the bills (H. R. 4826), which stated that, as to the prohibition against exclusive rights of fishery, it "shall not affect any right exercised by the descendants of the aboriginal people of Alaska or those of the half blood who are descendents of the aborigines which were exercised and claimed up to the passage of this Act." This proviso was dropped in the final bill.

If this proves anything, it proves that Indians were *not* to have special treatment. We should add, however, that if this case turned on "aboriginal rights", there would clearly be no basis for including ocean waters off Karluk in a reservation. As we describe in some detail below (pp. 54-60), the waters here in question have been fished by both natives and non-natives of Karluk continuously for over 150 years; indeed, they were one of the earliest Russian fisheries in Alaska.

Petitioner, finally, attempts to draw an inference from the undoubted fact that the White Act was not

[1] The Commercial Fishing Regulation have never mentioned any limitation on commercial fishing in these waters, other than the usual conservation rules equally applicable to everyone.

intended to discriminate *against* the Indians, and states (p. 45) that one amendment was rejected on the ground of probably injury to Indians. But it is a far cry from a lack of intention to discriminate against the Indians to an intention to discriminate in their favor. Congress did not reject one exclusive right in favor of another. The amendment to which petitioner refers to bolster his argument is wholly beside the point, and in fact emphasizes the Congressional desire for equality, not preference. The amendment referred to (65 Cong. Rec. 5973-5975) proposed to extend protection only to American citizens who employed American citizens. It was rejected on the statement of Mr. White that "Instead of this right [to fish] being open to every American citizen it will be open to some American citizens and denied to other American citizens because, perchance, of the men he employs to do his work." There is no warrant in the debates for petitioner's suggestion that the amendment had anything to do with Indians; the author of the amendment made it clear that they were American citizens who would not be affected either way. 65 Cong. Rec. 5974.

The sum total of petitioner's legislative history proves nothing. There is some evidence that Congress did *not* intend to permit exclusive rights in commercial fisheries to be created for Indians. Certainly there is nothing which would qualify the text of the act: "nor shall *any* citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted."

3. *The argument on administrative interpretations of the White Act.* The next suggestion which petitioner makes (Br. pp. 46-48) for avoiding the White

Act language is that "administrative interpretation" of the Act has excluded Indian fisheries from its prohibitions. One may well doubt that a positive prohibition may be avoided by "administrative interpretation" in any case, but in fact no such administrative interpretation exists.

The burden of the argument is that the White Act regulations issued by the Department of Commerce "particularly called attention" to four reserves (Annette Island, Aleutian Islands, Afognak and Yes Bay). This is disingenous. The regulations merely quoted the statute and the Executive Orders as part of "laws relating to the protection of Alaska fisheries", and did not in any way relate these statutes and executive orders to the regulations issued under the White Act. For that matter, the announcements have for years contained the text of the United States-Canada Halibut Treaty and its implementing statute (c. 392, 50 Stat. 325), yet this scarcely throws light on the meaning of the White Act.

Moreover, the argument is based on a plain misstatement of fact. Petitioner refers to the four reserves mentioned in the regulations as reserves "that in terms reserved fishing areas for native use" (Br. p. 47), and states that in the regulations "the attention of all fishermen was called to the prohibitions against non-native fishing in all four of those areas (Br. p. 47, n. 20). The true facts are that *except by special act of Congress* at the Annette Islands, no Indian or Eskimo reservation in Alaska has accorded an exclusive or special right of commercial fishery, and only with respect to the Annette Islands reservation did the regulations call attention to a prohibition against non-native fishing.

The Aleutian Islands Reservation, for example, one of the four to which petitioner refers, was set up by

Executive Order No. 1733 of March 3, 1913. It ordered that all islands of the Aleutian chain "be and the same are hereby reserved and set apart as a preserve and breeding ground for native birds, for the propagation of reindeer and fur bearing animals, and for the encouragement and development of the fisheries." Certain acts were prohibited. *There is no reference in the order to native fisheries.* Indeed, there is no reference to any native use of any sort even as to birds or animals. Petitioner's brief is plainly in error in referring to this order as one which "in terms reserved fishing areas for native use", and equally in error in stating that the regulations, which simply quoted the Executive Order, called attention "to the prohibition against non-native fishing" in that area.[5] The 1924 regulations (Dept. Circ. No. 251, 10th ed.) simply quoted the executive order. Beginning with the regulations issued on December 5, 1925 (*id.*, 12th ed.) conservation regulations have applied generally to the Aleutian Island Reservation. There has never been a reference to any distinction between native and non-native fisheries.

The Afognak Forest and Fish Culture Reserve is another of the reserves to which petitioner refers. Again, it did not grant exclusive fishing rights to Indians; it simply prohibited *all* fishing in the reserve. President Harrison's Proclamation of December 24, 1892 (27 Stat. 1052) creating the Reserve provided that "Warning is hereby expressly given to all persons not to enter upon, or to occupy, the tract or tracts of land or waters reserved by this proclamation, or to fish in or

[5] The partial revocation of the 1913 Executive Order by Executive Order No. 5000 of November 23, 1928 made no change in this request. It simply removed certain named islands from the reservation.

use any of the waters herein described * * *". The sole exception was that the proclamation was not to deprive "any bona fide inhabitant of said islands of any valid rights he may possess under the treaty for the cession of the Russian possessions in North America to the United States, * * *". *Ibid.* The 1924 White Act regulations (Dept. Circ. No. 251, 10th ed.) quote the executive order, and in the regulations themselves state that they are inapplicable to the Afognak area. The fish hatchery was abandoned in the late 1920's, however, and beginning with the 1929 White Act regulations, the Afognak waters have simply been subject to the general commercial fisheries conservation regulations. See Bur. Fisheries Doc. No. 1064, pp. 201, 206 (1929). Certainly no "administrative interpretations" can be gleaned from a reserve in which *all* were forbidden to fish until 1929, and *all* were permitted equal fishing rights thereafter.[6]

The last of the four reservations—Yes Bay—created as a salmon hatchery by Executive Order No. 405-B on February 4, 1906, is similar to Afognak, in that it closed the area to *all* commercial fishing. The language of the order quoted by petitioner (Br. p. 47, n. 20) permitting native residents "to take fish from the waters and fuel from the forests" has obvious reference to food and fuel for personal use, not to commercial fish-

[6] We do not disagree with petitioner's suggestion, elsewhere made in his brief (p. 57) that the White Act may properly be applied to an Indian reservation. Certainly it may, for conservation purposes by a regulation of general application. The 1946 regulations apply to the Annette Island Reservation, without exception. Regulations for 1946, pp. 64-65. So, one may assume, did the Volstead Act. Dual prohibitions by separate statutes are frequent, but this does not prove that the seizure provisions of the White Act could be used to enforce compliance with regulations concerning the taxing and sale of alcoholic beverages.

ing. The White Act regulations themselves have specifically forbidden *all* commercial fishing in that area since 1925. (Dept. Circ. No. 251, 12th ed., p. 21). Since 1937 the regulations have not even quoted the Yes Bay executive order.

One other related matter may also warrant a brief comment at this point. In an effort to show that the new system of regulation will not do exactly what the White Act forbids, petitioner tries to convey the impression throughout his brief that the Indians *as consumers* are to be the beneficiaries of the new order at Karluk. Thus the brief refers to "the importance of fishing to the Alaska Indians" (p. 26); to the "necessities of life" (p. 28); to "food supply of the Indians" (p. 42); and we are even reminded discreetly of starving Indians and workdogs (p. 41). In short, the impression is conveyed that the Indians are either going to eat the salmon caught at Karluk or get direct consumer benefit from them.

The argument is very nearly grotesque. This record shows that there are 57 Indian "voting residents" (adults) of Karluk (R. 462), and if they with their families did nothing all year but eat salmon, they would scarcely make a dent in the Karluk catch. Respond-

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[7] Petitioner refers also (Br. pp. 48-49) to a reserve at Amaknak Island, and to three reserves created after the one at Karluk, as evidence of administrative interpretation. The three created in 1943, after the Karluk Reservation was challenged, obviously add nothing. But an even more conclusive answer is that in none of the four areas were any commercial fishing waters involved. Amaknak is on the same island with, and near Dutch Harbor, and has some value in that the upland area is useful as a shore station for the preservation of herring, and it is to this that the order was no doubt intended to apply. The White Act regulations relating to Alaska fishing have never referred to any limits on commercial fishing at Amaknak which is a fair indication that none have ever existed.

cuts used 638 cannery workers and 459 fishermen in 1946 at Kodiak (R. 28-29), almost 20 times the number of Karluk adults. Respondents have invested $886,000 in floating equipment which the Karluks would have to duplicate before they could manage the Kodiak catch. Most of the Karluk adults already work for respondents or other cannery operators or fishermen (R. 309). As the court below stated (R. 505):

> "There is no evidence that the catch of the white fishermen in the waters sought to be reserved for the Indians in any way lessened the catch of the fifty Indian families or the wages they earned. It is fair to assume that since six hundred-odd white fishermen used these waters without interfering with each other, the 57 Indian fishermen would find no greater interference. Indeed, so far as their purchasing power is concerned, it well may be that it was much higher than before the white men established their plants on Kodiak Island.

The plain truth is that the regulation will not result in a single Indian—or his dog—eating even one more salmon than he would have if the regulation had not been issued. Indeed, there is not a word in the Record in this case, as distinguished from petitioner's brief, to indicate that there is any shortage of salmon for Indian use or that respondents are interfering with a full Indian catch. So far as we know, no statute or regulation restricts the Indian from catching fish in these waters at any time for his personal or family use.

What is here concerned are the commercial fisheries of Alaska. What is sought is restrictive and selective licensing—at a price which, in substance, is a tax unauthorized by either Congress or the Territorial legislature. The petitioner concedes in his brief that the Karluk Indians are going to restrict the number of licenses (Br. p. 65). The record shows that this is con-

templated (R. 128). Indeed, unless someone is excluded, the belatedly suggested conservation purpose would not even theoretically be served.

In short, in 1922 the Government began a permit system without statutory sanction. By 1924 Congress, reflecting the widespread dissatisfaction with the device, forbade it by the flat prohibitions of Section 1 of the White Act. Now it is proposed to recreate the old permit system, with but two differences: (a) under the new program, the permittee must pay a tax to the Indians and meet their other conditions to get the permit, which was not required under the old system; and (b) under the new program, permits are granted and are revocable on the signature of a Karluk Indian, rather than the Secretary.

We do not believe that the permit system 1947 style, would have pleased Congress any more than the 1922-1923 model. Whether it might or not, all exclusive rights were specifically prohibited by the White Act. The "exclusive rights" permit system cannot, by changes of detail, be legally resurrected after its careful, considered, and unqualified Congressional interment in 1924.

4. *The argument as to repeal by implication.*—Finally, as a last resort, petitioner seeks to escape the conflict between the equality mandate of the White Act and subsection (r) by arguing that it has been *pro tanto* repealed by the Act of May 1, 1936 (c. 254, 49 Stat. 1250) under which the purported Karluk Reservation was set up. This argument (Br. pp. 47-50) is generously stated (pp. 49-50): "The only part of the White Act that would fall * * * is the equality provision."

The patent absurdity of this argument is more fully dealt with in Point II, *infra*. Suffice it to say here

that the 1936 Act was a technical amendment to the Wheeler-Howard Indian Reorganization Act of 1934 designed to correct an omission in the original Act; it was treated solely as an Indian matter; it was passed with no hearings or discussion, and it makes no mention whatever of waters or fisheries.* Not a word concerning fisheries or wafers appears in the brief Congressional consideration of this minor amendment. It is difficult to accept seriously the suggestion that the 1936 Act could under those circumstances be urged as an implied repeal of the fundamental and important limitation on the Secretary's White Act power in that organic fisheries act for Alaska. See pp. 67-74, *infra*.

Moreover, though urged as a last resort on the present appeal, the argument has been tried, and has failed, once before. In 1944 Congress, in connection with a proposed revision of the White Act, was requested by the Department of Interior to condition the equality clause by making it "subject to the provisions of * * * the Act of May 1, 1936, and to other applicable laws". The request was specifically rejected by the Senate Committee on Commerce, which stated (S. Rep. No. 733, 78th Cong., 2d Sess., p. 6):

> "In its second and latest series of proposed amendments, however, the Department asked that this existing language of the present law be changed so as to make it 'subject to the provisions of * * * the act of May 1, 1936 (49 Stat. 1250, e.

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*The House Committee on Indian Affairs, to which the bill was referred, noted that no objections to the bill were "entertained by any of the other Indians or Eskimos of Alaska so far as known to the Committee." H. Rep. No. 2244, 74th Cong., 2d Sess., p. 3. No one, it is clear, thought that fisheries, or fishing interests, were involved. The Senate Committee on Indian Affairs simply adopted the House Report. S. Rep. No. 1908.

254), and other applicable laws." What is meant by 'other applicable laws' is unknown. The 1936 act referred to appears to be the amendment of that year to the Wheeler-Howard Indian Reorganization Act. This 1936 amendment to the Wheeler-Howard law was enacted, without any recorded hearings, in the Seventy-fourth Congress, in response to a request of the Secretary of the Interior that Congress correct an oversight in the original Wheeler-Howard Act which had omitted to authorize the Secretary to issue charters of incorporation to groups of Alaskan Indians. The 1936 amendment also authorized the designation of certain Indian lands in Alaska as reservations.

"The committee does not deem it appropriate to deal with Indian questions in the present bill which relates to the conservation of the Alaskan fisheries. For this reason, it recommends the deletion of the reference to aboriginal rights in the bill as introduced, and the reenactment without change of the language of the existing law. For the same reason, the committee feels that it cannot recommend a congressional endorsement of the Department's suggestion that the act of May 1, 1936, qualified the prohibition in the White Act against the creation of exclusive fishery rights. *Since neither the White Act nor the subject of Alaskan waters or fisheries were at any time mentioned during the consideration of the* 1936 *Act*, to which the Department now refers, *the committee feels that it should not in this casual fashion be asked to confirm a suggested implied repeal of an earlier law.*" (Italics supplied.)

The statement by the Committee which was responsible for the White Act, and which was considering its modification, is of course entitled to respect. *Sioux Tribe* v. *United States*, 316 U. S. 317, 329.

B. SECTION 208.23 (c) IS INVALID BECAUSE IT IS NOT A CONSERVATION MEASURE.

The objection to the challenged regulation does not stop with the fact that it is squarely in the teeth of the specific prohibitions of the White Act. In addition, we believe the regulation must fall because it is plainly *not* a *conservation* regulation, but simply an *in terrorem* means of compelling recognition of an alleged Indian reservation.

The regulation purports, of course, to be issued under the authority conferred by the White Act. There is no ambiguity about the *conservation* purpose of that enactment. The first words of the first sentence are "That *for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska*" the Secretary may issue regulations. Nor is there ambiguity in the context of the law: conservation alone is to control the Secretary's action. By his regulations he may set apart fishing areas and establish closed seasons and prohibit or limit fishing. He may limit the total catch in any area. He may control the time, means, methods and extent of fishing. He may permit the taking of fish for bait at any time. He may discriminate between types of gear in particular areas. He may not, as we have already pointed out, discriminate as among citizens.

This is *conservation* language, exemplifying the purpose of the statute. It has nothing to do with Indian reservations. Congress delegated its legislative powers

over the Alaskan commercial fisheries, and authorized administrative action to be taken, because it wanted to *conserve the fisheries*, not, emphatically, because it wanted to give the Secretary powers to achieve any collateral purpose which he might deem desirable. Congress authorized the drastic sanctions which are contained in the Act—fines, forfeitures, immediate seizure of gear and catch, and imprisonment—because it saw the need for timely protection of the annual runs of fish, not so that the threat of such penalties could be used to achieve other purposes than conservation of the fish.

Thus, without more, subsection 208.23(r) is fatally defective, because it is not a conservation regulation. Section 208.23 of the Regulations (Appendix *infra*) deals with the Kodiak Island area, and specifies, in subsections (a) through (q) the waters closed to salmon fishing. Subsection (r) begins by including in the closed area all waters adjacent to the Karluk Indian Reservation and within 3,000 feet thereof. *But*, it goes on to say (the statutory reference is to an Indian reservation statute), that—

> "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives. (49 Stat. 1250)."

The most striking thing about subsection (r) is that it does not even fit under the title of Section 208.23, "Waters closed to salmon fishing." There is no closing, nor any limitation on fishing, or total catch, or

[9] After suit was filed, the regulation was amended (41 F. R. 952) by adding: "Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative."

gear—in short, no conservation in it, at all. It is no more, in effect, than a designation of who may fish, and a sub-delegation of authority as to who shall decide who else may fish.[19] All natives on the reservation—some 50-odd adults, men and women, are specifically permitted to fish in this area: all persons to whom the natives gives "authority" to fish—subject to whatever conditions the Indians may impose by way of fees or otherwise—may also fish in the area. What the subsection does is no more than to grant an exclusive monopoly position to the Karluk Indians. It is not related to vessels, gear or catch. It neither prohibits nor limits fishing. Whether fish are or are not to be caught in these ocean waters, and by whom, is dependent upon authorization of the Karluks. The belated effort to dress up the regulation by taking back veto power on the Karluk village ordinances merely confirms the point that the regulation is not for the purpose of conservation, but for the protection of alleged Indian reservation rights.

By no stretch of administrative imagination can this be deemed conservation. And, until the briefs in the court below, no one had the temerity to suggest that it was anything other than an attempt to enforce the purported Indian reservation. Even assuming that one must blind himself to the facts that there was first an unsuccessful attempt to exact a toll and impose

[19] It should be noted that the veto power (fn. 9, *supra*) does not, to any substantial degree, modify the sub-delegation. If the Karluk natives choose to issue no permits, the Secretary is powerless. If they chose to charge $5,000 each for permits, the Secretary may veto, but if the Karluk natives stand firm again no permits issue. The same is true if the Karluk natives choose to issue permits only to one company, or only to Roman Catholics, or only to other Indians or Eskimos.

conditions on fishing by all but Karluk Indians on the theory that there was a valid Indian reservation under the 1936 reservation act, and only when that failed was there an attempt to use White Act sanctions to achieve the same result—this belated conservation argument falls.

The argument proceeds on the theory that (p. 62)—

> "A year-round resident of a community which depends for its livelihood on the salmon of a given river is more likely not to catch or permit to be caught the marginal salmon needed for perpetuation of the run than an itinerant outsider."[11]

State laws denying or qualifying fishing opportunities to non-residents are cited.

One hardly needs to point out that there is nothing in the regulation which makes it turn on residents and non-residents. Anyone may be "authorized" by the Village of Karluk to fish. We need not rely on the

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[11] Although name-calling does not warrant an elaborate answer, we may direct the attention of the Court to the Findings that these "itinerant outsiders" had fished these waters for periods up to 24 years, had investments totaling $886,000 in floating equipment and $1,189,000 in plant, and had spent about $1,500,000 in preparation for fishing operations (R. 29). One "itinerant outsider" has been fishing at Karluk since 1886, and fishing by non-natives of Karluk goes back of 1800. See pp. 55-56, 58-60, *infra*. Land grants to canneries at this point were confirmed by special act of Congress (May 21, 1900, c. 486, 31 Stat. 180), the Congressional Committee noting even then that "an expensive salmon fish hatchery [was] maintained by these parties in the Karluk River." H. Rep. No. 34, 56th Cong., 1st Sess. (1900). It is patently absurd to suggest, even by way of assumption, that those whose continued existence depends on maintenance of the fisheries are less interested in conservation than those given the right to collect a fee from others who fish.

obvious inconsistency between petitioner's insistence (Br. p. 9) that some of respondents' non-resident fishermen paid their fees and were given permits, and his argument that the regulation is really "conservation" because non-residents are excluded. Nor need we emphasize that the White Act directs the administrative officials themselves to determine conservation rules, and the time, means and extent of fishing. One will search the Act in vain for any warrant for the sub-delegation of authority to make such determinations, particularly when they are asserted to rest on matters of Karluks against non-Karluks, or residents against non-residents.[12] Cf. *Toomer* v. *Witsell*, 334 U. S. 385.

But an even closer answer to the contention is that discrimination between Karluks and non-Karluks, or between Alaskan residents and non-residents, *is primarily what the White Act forbids.* Indeed, the claim that such factors had entered into the "conservation" activities of the Secretary was the very reason why the White Act was passed, and why the prohibitions were inserted in Section 1. In words capable of no misunderstanding, the Secretary is enjoined against issuing any regulation which denies to *"any citizen of the United States"* the right to fish where others are per-

[12] One may also note that whereas conservation rules issued by the Secretary are published in the Federal Register, the terms and conditions under which the Village of Karluk will permit non-Indians to fish are not so published. Moreover, the so-called Karluk permits (R. 466 *et seq.*), which petitioner insists should have been admitted into evidence (R. 84-85) show that they are revocable "in the discretion of the issuing officer"—the Indian "President" of the Village (R. 466). Perhaps it is not unfair to question his authority as a conservationist, but in any event, this is sub-delegation which must in itself defeat the regulation. "This is delegation running riot." Cardozo, J., in Schechter Corp. v. United States, 295 U. S. 495, 553. See also ftn. 9, *supra*.

mitted by that regulation to fish. This right "is guaranteed to every citizen of the United States without reservation, whether he be a resident of Alaska or not." *Freeman v. Smith*, 44 F. (2d) 703, 706 (C. C. A. 9, 1930).[13] Thus petitioner's suggestion in attempted support of his belated conservation argument leads necessarily to saying that the regulation violates the plain prohibitions of the Act. Perhaps not even petitioner would venture to argue that administrative officials could "conserve" the Alaskan fisheries under the White Act by granting fishing permits only to Alaskan residents. Yet that is precisely what his present argument really is.[14]

[13] In Dow v. Ickes, 123 F. (2d) 909 (App. D. C. 1941), *certiorari denied*, 315 U. S. 807, the court sustained the regulations of the Secretary requiring fixed fishing gear, such as fish traps, to be a certain distance apart. The court's statement (p. 916) that the White Act did not guarantee "equality in the absolute sense" was only with reference to the fact that two traps could not, in the nature of things, occupy the same space at the same time.

[14] If "conservation" under the White Act can support a regulation permitting residents to fish and excluding non-residents, it seems strange that Congress considered at length in 1936 and rejected a bill limiting seine fishing in Alaska to Territorial residents. See H. R. 8213, 74th Cong., 1st Sess. Not only did the bill imply that legislation would be necessary to accomplish the result, but the then Commissioner of Fisheries filed with Congress a memorandum approved by the Secretary of Commerce stating that the proposal was "diametrically opposed to section 1 of the Act of June 6, 1924" (the White Act). Hearings before the House Committee on Merchant Marine and Fisheries, p. 6.

The one instance in the White Act regulations in which there is a discrimination based on residence (50 C. F. R. secs. 203.3, 202.6; see Pet. Br. p. 59) is one specifically required by a statute enacted in 1934. Act of April 16, 1934, c. 146, 48 Stat. 595, U. S. C., Title 48, Sec. 232.

That a regulation for a feigned and unauthorized purpose must fall is not open to doubt. Indeed, courts have, on occasion, gone behind even stated legislative purposes. *Hale* v. *Bimco Trading Co.*, 306 U. S. 375; *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10. We scarcely need add that the Secretary is without power to utilize the White Act *conservation* sanctions to enforce an Indian reservation created—improperly, as we show in Point II, infra—under *another* statute. That simply may not be done. In *L. P. Steuart & Bro.* v. *Bowles*, 322 U. S. 398, this Court said (p. 404):

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute."

Or, as Mr. Justice Brandeis said in *Iselin* v. *United States*, 270 U. S. 245, 251: "To supply omissions transcends the judicial function." Had Congress wished to punish trespass on an Indian reservation by sanctions of forfeiture, fines and imprisonment, it would have said so. It has not. Petitioner, with complete candor, states (Br. p. 57): "There is no penal statute enforceable against trespassers on Indian reservations in Alaska." The Secretary may not enact that penal statute on Congress' behalf, and by the same token, petitioner may not threaten such sanctions against respondents to aid in enforcement of a regulation which has nothing to do with the conservation purpose of the White Act. Accordingly, Section 208.23(r) is invalid on its face because it is obviously not a conservation measure authorized under the Act.

* * * * *

One can only conclude, from the sheer number of suggestions which petitioner puts forward in his attempt to by-pass the White Act, that he is seeking to build an impression of strength from a multitude of weaknesses. The challenged regulation is not conservation, and, until this case was in the appellate courts, no one suggested that it was. That alone would dispose of it. But in addition, it flies in the teeth of specific White Act prohibitions. No matter how petitioner attempts to turn and twist the arguments, the consequence cannot be escaped—subsection (r) is in violation of the White Act, and was properly enjoined on that ground.

II

The Act of May 1, 1936, Did Not Authorize the Inclusion of Ocean Waters in the Karluk Reservation.

The essential issue in this case is, of course, whether the District Court properly enjoined the enforcement of the White Act sanctions against the respondents. Hence, on some possible theories of the case, the validity *vel non* of the purported inclusion of tidelands and ocean waters in the Karluk Reservation is irrelevant. If, as we have urged in Point I, *supra*, the White Act, denies absolutely to petitioner the right to apply to this area in this fashion the penalties of that Act, then the Act of 1936 and the Land Orders issued under it cannot cure the deficiency.

Yet the issue of the valadity of the inclusion of ocean waters within the Karluk Reservation is argued at length by the petitioner, and it intrudes repeatedly and on some theories necessarily into the discussion. Petitioner would utilize the 1936 Act for the purpose of avoiding the positive prohibitions of the White Act,

arguing that, as to a valid Indian reservation, either that the White Act does not apply, or that it has been repealed by implication by the 1936 Act. We have answered the contentions, from the point of view of the White Act, in Point I; here we deny the premise of the arguments: that the reservation of ocean waters is valid. Both of petitioner's positions fall, and his argument falls altogether, if an ocean water reservation is invalid.

Respondents are of course anxious that the issue as to the validity of the reservation of ocean waters be determined, and a long controversy set to rest. In the interest of clarity, however, we should note the following:

(a) A decision by the Court, with respondents, that the White Act prohibitions prevent the grant of an exclusive fishing privilege, reservation or no reservation, makes the validity of the reservation immaterial.

(b) A decision by the Court, with respondents, that the White Act sanctions can be invoked only in the interest of conservation and that the challenged regulation is an Indian relief measure rather than a conservation order, makes the validity of the reservation immaterial.

(c) If, however, the Court should hold, with petitioner, that the White Act prohibitions are inapplicable, for any reason, in Indian reservations, then the question necessarily arises whether there is a valid reservation of the ocean waters.

In sum, the Court can hold *for* respondents on two theories under either of which the validity of the reservation is not reached. It can *hold* against respondents

only by deciding the basic points against them and also deciding that the reservation itself is valid.

* * * * * *

Public Land Order No. 128 (Appendix, *infra*) provides that the Karluk Indian Reservation, which it creates, shall include not only the land bordering on Shelikof Strait, but also—

> "the water adjacent thereto extending 3,000 feet from the shore line at mean low tide."

The claimed statutory authority for the Order is the Act of May 1, 1936 (c. 254, 49 Stat. 1250), and it is upon that statute that petitioner relies in his brief in this Court.[14a] We believe that this attempt to create a reservation in the ocean must fail, because of the complete absence of any statutory authority on which it can rest, and that the court below, which so held, should be affirmed.

Section 2 of the Act of May 1, 1936, upon which petitioner relies for authority to include ocean waters in the Karluk Indian Reservation is, in its relevant parts, as follows:

> "That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101); or which has been heretofore

[14a] Public Land Order 128 is also based on two other statutes, "the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U. S. C., title 43, secs. 141-143)" but these statutes are relevant, if at all, only to the upland area. Neither statute is referred to in Petitioner's brief.

reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, *together with additional public lands adjacent thereto*, within the Territory of Alaska, or *any other public lands* which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of *any such area of land* as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo *residents thereof* * * * *Provided further*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, * * *." (Italics supplied.)

Simple analysis of the statute, as indicated in the opinion below (R. 501-502), reveals that there are four separate categories of land which the Secretary is authorized to designate as an Indian reservation:

(a) "any *area of land* which has been reserved for the use and occupancy of Indians or Eskimos by Section 8 of the Act of May 17, 1884," or

(b) "any *area of land* which has been reserved for the use and occupancy of Indians or Eskimos by * * * section 14 or by section 15 of the Act of March 3, 1891,"

(c) "any *area of land* * * * which has heretofore been reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof,"

The section, in other words, is simply a reservation from sale and homestead entry; it could have no application to ocean waters, which of course were not subject to entry and sale. *Shively* v. *Bowlby*; *Mann* v. *Tacoma Land Co.*, *supra*. Moreover, as we have pointed out above (p. 48) the regulations which the Secretary of the Interior issued under the 1891 Act specifically excluded not only ocean waters, but also tidelands, from the scope of the act. Finally, it does not appear likely that ocean waters are susceptible of "actual occupation", which obviously connotes residence and not use.[21]

3. THE FACTS WITH RESPECT TO THE FISHING IN OCEAN WATERS AT KARLUK DO NOT PERMIT THE APPLICATION OF THE 1884 AND 1891 ACTS, NO MATTER HOW THEIR LANGUAGE IS CONSTRUED.

We have discussed the language of the 1884 and 1891 Acts because we believe that, on their face, they may be seen to be no authority whatever for including ocean waters in an Indian reservation. But we can, and we believe we should, add the additional answer which is supplied by the facts. No matter how the 1884 and 1891 Acts may be construed, ocean waters at Karluk cannot qualify. Each of the acts speaks of rights as of the date when it was passed, not rights to be acquired in the future. Rights under the 1884 Act, for example, depend on a showing of actual occupation *in 1884*, plus a chain of title since then by consanguinity or a recognized mode of conveyance. *Miller* v. *United States*, 159 F. (2d) 997 (C. C. A. 9, 1947). The record and historical sources both show that ocean waters at Karluk could

[21] Such, for example, has been the construction placed upon the phrase, as used in the 1936 Act, by the Solicitor of the Department of the Interior. Sol. Ops. of April 19, 1937 (No. M. 28978), and of September 14, 1937 (No. 31634).

(d) "together with additional *public lands* adjacent thereto, within the Territory of Alaska, or any other *public lands* which are actually occupied by Indians or Eskimos within said Territory."

Petitioner, in his present brief, has radically changed his view of the category in which the ocean waters are supposed to fall. As noted by the court below (R. 502), he did not contend below that categories (a), (b) or (c) had any application whatever. His argument there was that a 40-acre tract in the village of Karluk had been reserved for a school on March 4, 1930 (Executive Order No. 5289), and that the waters of Shelikof Strait were "public lands adjacent thereto" within category (d). That, indeed, was the argument in the petition for certiorari.[15] Now, however, in an obvious effort to avoid the force of the analysis of the court below with respect to the phrase "public lands" used in category (d), he suggests also that the ocean waters were land "reserved for the use and occupancy of the Indians" under categories (a) and (b).

We think this last-minute argument is of no avail, for a number of reasons. First, however, let us deal with category (d) which, until now, has been assumed to be the statutory foundation upon which the reservation of ocean waters must rest.

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[15] Actually, petitioner is in error on the school reservation. The Executive Order of 1930 authorized a reservation of land not in excess of 40 acres to be set aside for a school. In April, 1935, a plat of the school reserve was approved in the General Land Office (Survey No. 2030) showing a reserve of 0.35 acres. Thus the whole Karluk Reservation is alleged to be "public lands" adjacent to what amounts to a large school yard less than half an acre in size. See R. 312.

not possibly be claimed under that act. Petitioner, of course, made no attempt to prove any such right. In fact, the two Karluk natives who testified had lived at Karluk only since 1921 and 1934, respectively (R. 348, 358).

Petitioner's brief makes the truly amazing statement (p. 15), with respect to these ocean waters, that "The natives of Karluk * * * had occupied and used the area in question since time immemorial * * *." The same assertion, or assumption, appears elsewhere in the brief (*e. g.*, pp. 18, 25, 26, 33). Petitioner's argument on the 1884 and 1891 Acts (and indeed on the whole case) appears to be that the native inhabitants of Karluk were in undisputed possession and enjoyed exclusive use and control of the ocean off Karluk and the salmon fisheries therein, from "time immemorial" down to 1938, when respondents first breached their exclusivity, and that the reservation was created by the Secretary of the Interior to preserve or restore the status quo. None of this is supported by the record, and nothing could be further from the fact.

We do not wish to burden the Court with a detailed history of Karluk, and so far as possible we will refer to matters given in full in the Appendix. There is some information, however, in the Record. It shows that non-Karluk fishermen have been extensively engaged in commercial fishing in the area since 1882; during all of that time the Alaska Packers Association, and its predecessors in title, have taken fish in that area with white fishermen (R. 307). During that time, moreover, the Alaska Packers Association has employed most of the native inhabitants of Karluk as company fishermen. The two beach seines which are operated at Karluck are owned by the Alaska Packers Association; the "native beach seines" to which petitioner refers (Br.

A. THE WORDS "PUBLIC LANDS" IN THE 1936 ACT DO NOT INCLUDE OCEAN WATERS.

Petitioner, in his discussion of the 1936 Act, refers continuously to tidelands, and seeks to give the impression that the issue here is whether tidelands can be included in an Indian reservation. Actually, that issue is not presented in this case, as the court below noted (R. 499, n. 1). The permanent injunction issued by the District Court (R. 41) does not apply to enforcement of the challenged regulation on the tidelands—the area between mean high and mean low water. What *is* presented, if the Court reaches this Point II, is the validity of a reservation in the open ocean, below mean low tide. We shall refer to some of the tidelands cases, because heretofore, so far as we know, no one has ever even asked the courts to rule that ocean waters are "public lands." We regard ocean waters as *a fortiori* in the tideland cases.

There appears, however, to be agreement that the decisions of this Court are unanimous in holding that the phrase "public lands" does not include ocean waters—or even tidelands, for that matter. Indeed, as the court below pointed out, a decision of this Court less than six months prior to the 1936 amendment had held, in construing a statute relating to the jurisdiction of the Department of the Interior in pre-emption claims, that "the public lands of the United States" did not include ocean tidelands. *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10. The Court said (296 U. S. at p. 17):

> "Specifically, the term 'public lands' did not include tidelands. *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284. 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under gen-

eral laws.' *Newhall* v. *Sanger*, 92 U. S. 761, 763; *Booker* v. *Harvey*, 181 U. S. 481, 490; *Union Pacific R. Co.* v. *Harris*, 215 U. S. 386, 388."

Thus, Congress used the phrase "public lands" in the 1936 Act not only in the light of the very recent construction of those words by this Court, but also in the light of a uniform and unvarying construction which had extended over more than half a century. In *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, tidelands were also claimed under a statute which referred to "unoccupied and unappropriated public lands of the United States." The Court said (153 U. S. at p. 284) that "the term 'public lands' does not include tide lands," and again quoted the language of *Newhill* v. *Sanger* to which it had referred in the opinion in the *Borax* case set out above. See also *Heckman* v. *Sutter*, 128 Fed. 393, 394-395 (C. C. A. 9, 1904).

Petitioner, while not denying that "public lands" has always been so construed, asserts that nevertheless in this case Congress used the words intending to include not only tidelands, but also ocean waters, because this is legislation with reference to Alaska (Br. pp. 19-21). Why this fact is significant is not wholly clear, but it appears to be grounded on the assumption (Br. p. 21) that the general land laws of the United States do not apply to Alaska. Not only is the assumption in error, but the evidence with which petitioner attempts to give some substance to the distinction between Alaska and elsewhere is wholly unconvincing.

Petitioner refers (Br. p. 21) to the first Organic Act for Alaska of May 17, 1884 (23 Stat. 26) as authority for his assumption. He neglects to note, however, that in the second Organic Act of August 14, 1912 (37 Stat.

512; U. S. C., Title 48, Sec. 23) Congress expressly provided that—

> "'The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within said territory as elsewhere in the United States.''

He also neglects to note that even before 1912, Congress had, in a series of laws, specifically extended various provisions of the General Land Laws to Alaska; they are noted in the margin.[16] In other words, the premise on which petitioner bases his argument for construction of the 1936 Act has not been true for almost a quarter of a century.

But, as we have said, not only is the basic assumption in error, but the evidence upon which petitioner relies to give substance to the distinction between Alaska and elsewhere is wholly unconvincing. First, he cites two cases in which courts in Alaskan litigations have used the phrase "public domain" to include both land and water areas. We fail to see what light the use of "public domain" sheds on the meaning of "public lands." Apart from that, however, there is nothing whatever in the opinions to suggest that the court thought that the terminology was peculiar to Alaska or Alaskan waters. In neither case did Congress use the phrase "'public domain.'' Actually, in one of the cited cases (*Alaska Gold Recovery Co.* v. *Northern Mining &*

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[16] Act of May 14, 1898, c. 299, 30 Stat. 409, U. S. C., Title 48, Sec. 371 (homestead laws); Act of June 6, 1900, c. 786, 31 Stat. 322, U. S. C., Title 48, Sec. 381 (mining laws); Act of June 6, 1900, c. 796, 31 Stat. 658, U. S. C., Title 48, Sec. 431 (coal land laws); Act of March 3, 1899, c. 424, 30 Stat. 1098, U. S. C., Title 48, Sec. 351 (public land surveys); Act of March 2, 1907, c. 2537, 34 Stat. 1232, U. S. C., Title 48, Sec. 365 (land districts).

Trading Co., 7 Alaska 386 (1928)) the statute with which the court was concerned illustrates that when Congress intends to deal with ocean waters it does not lack for language to express itself; the act stated that "no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine, under any of said waters below low tide * * * but citizens * * * shall have the right to dredge and mine for gold or other precious metals in such waters, below low tide * * *." Act of June 6, 1900, Sec. 26, c. 786, 31 Stat. 329; U. S. C., Title 48, Sec. 381. Had Congress intended to permit the extraordinary step of a reservation in ocean waters by the 1936 Act, presumably it would have used somewhat similar language. It did not; it said "public lands." It did not even say "public domain."

Second, petitioner refers (Br. p. 19) to two statutes dealing with Alaska in which, he asserts, the words "public lands" are used in contexts which suggests that in using them Congress meant to include ocean waters. The first is Section 12 of the Act of March 3, 1891 (c. 561, 26 Stat. 1095). We find it difficult to see how this statute, passed almost 50 years ago and before the Organic Act of 1912, *supra*, had extended all laws to Alaska, can be said to be in *pari materia* with the 1936 Act, particularly since Section 12, upon which the argument rests, was repealed only seven years later by the Act of May 14, 1898 (c. 299, 30 Stat. 409).

But even in discussing this 1891 Act petitioner errs in asserting that the context of the act shows that the phrase "public lands" in Section 12 includes ocean waters. The language of the act gives authority to *purchase* certain public lands; petitioner certainly cannot assert that Congress was authorizing the sale to private persons of ocean waters. Moreover, it limited

the right to purchase to persons "in possession of and occupying public lands for the purposes of trade or manufactures"; one could hardly qualify for ocean waters under that. Finally, if there could be any doubt about it, the regulations issued by the Secretary of the Interior under the statute[17] specifically provide (Par. 16): "Where a tract to be surveyed fronts upon tide water, the front or meander line will be run at ordinary high water mark, and the side lines of the tract will terminate at such high water mark, *thus excluding from survey and disposal all lands situated between high and low water marks.*" (Italics ours.) The contemporaneous constructions of "public lands" thus not only excluded ocean waters but even tidelands.[18] The provision in Section 14 cited by petitioner (p. 19), requiring all patents issued under Section 12 to reserve the right of the United States to regulate the taking of salmon, undoubtedly was intended by Congress to permit it to protect the salmon runs in the fresh water streams and on the tidelands regardless of the rights of the abutting owners. The provision has not been inserted in any

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[17] 12 L. D. 583, 588 (June 3, 1891).

[18] Petitioner cites Presidential Proclamation 39 dated December 24, 1892 (27 Stat. 1052), which created, pursuant to the 1891 Act, the Afognak Fish Culture Reserve on Afognak Island with waters adjacent thereto, as proof that "public lands" as used in that statute were understood to include ocean waters. In fact, the phrase "public lands" appears in the statute in Section 24, in a context which shows unmistakably that ocean waters were not referred to; it dealt with the creation of forest reservations and referred to "any part of the public lands wholly or in part covered with timber or undergrowth." The Afognak Proclamation was based on Sections 24 and 14, the latter of which specifically authorized the creation of a fish culture reservation at Afognak. The Proclamation, therefore, is not inconsistent with the regulations under the 1891 Act issued by the Secretary.

patent issued by the Land Office since the repeal of the 1891 Act in 1898.

The second statute referred to is the Act of July 3, 1926 (44 Stat. 821, U. S. C., Title 48, Sec. 360), which authorized the leasing of "public lands of the United States in the Territory of Alaska" for fur farming. The only suggestion that a fur farm might be in ocean waters is a proviso that any permit or lease under the statute "shall reserve to the Secretary of the Interior the right to permit the use and occupation of parts of the leased areas for the taking, preparing, manufacturing or storing of fish or fish products.". The explanation for the proviso is no doubt the same as for the similar language in the 1891 Act. Moreover, it is scarcely enough to lead to the conclusion that when Congress referred to "public lands * * * suitable for fur farming" it intended to authorize leases of ocean waters. The petitioner refers to no such lease, and we believe that there never has been any.

B. PETITIONER OBTAINS NO SUPPORT FOR HIS POSITION FROM THE 1884 AND 1891 ACTS REFERRED TO IN THE 1936 AMENDMENT.

1. PETITIONER MAY NOT NOW EXPAND THE ISSUES PRESENTED IN HIS PETITION FOR CERTIORARI.

As we have already pointed out, petitioner now for the first time seeks to justify the inclusion of ocean waters in the Karluk Reservation on the ground that they are an "area of land which has been reserved for the use and occupancy of Indians or Eskimos by Section 8 of the Act of May 17, 1884, or by Section 14 or by Section 15 of the Act of March 3, 1891". He attempts thus to present for interpretation the phrase "area of land" rather than "public lands".

That was not an issue presented to the court below, as it points out (R. 502). Nor was it presented to this

Court by the petition for certiorari. In the petition the first question presented was stated to be (p. 2):

> "1. Whether the Act of May 1, 1936, authorizing the Secretary of the Interior to set aside 'public lands' in Alaska as Indian reservations * * * ."

In the petitioner's brief, however, the first question presented has been modified to read (p. 2):

> "1. Whether the Act of May 1, 1936, authorizing the Secretary of the Interior to set aside '*any area of land*' *or* 'public lands' in Alaska as Indian reservations * * * ." (Italics supplied.)

Under well-settled doctrine, "this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner." *Helis v. Ward*, 308 U. S. 365, 370. "Petitioner is not here entitled to decision on any question other than those formally presented by its petition for the writ." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179. See also *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 389.

The new question, moreover, presents an issue of fact. Petitioner attempts to supplement the Record on this issue by a few references to outside sources. As we point out in some detail below (pp. 54-60), he in fact contradicts the evidence which is in the Record, and draws conclusions which full reference to his outside sources, and others, show to be wholly untenable. We respectfully suggest, however, that this Court should not be required to resolve fact issues neither pleaded, nor presented to, nor decided by, the lower courts.

For obvious reasons, we cannot rely solely on this point. Without in any way indicating that we waive it (if that be possible) or that we regard it as unsound, we proceed to an answer to petitioner's new contentions.

2. THE LANGUAGE OF THE 1884 AND 1891 ACTS SHOWS THAT THEY DO NOT APPLY TO OCEAN WATERS.

Section 8 of the Act of May 17, 1884 (c. 53, 23 Stat. 24, 26; U. S. C., Title 48, Sec. 356) extended to Alaska the laws of the United States relating to mining claims and made Alaska a land district with a United States Land Office at Sitka. A proviso stated—

> "That the Indians *or other persons* in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

Petitioner, by omitting (Br. p. 15) the italicized words in the proviso, attempts to make it appear to be an Indian statute. It plainly was not; it made no reservation, and recognized no use or occupation or claim, on the part of Indians that it did not also recognize on the part of any other person.

The true character of the 1884 Act is stated in *Young v. Goldsteen*, 97 Fed. 303, 307 (D. C. Alaska, 1899):

> "The title to all these lands, mineral and non-mineral, remained in the federal government. Those making the improvements had a possessory right or title only to the premises occupied and improved by them. The mineral claimant had no greater or different right or title to the premises occupied by

him than had the non-mineral claimant. This was the condition of land titles in Alaska when a form of civil government was extended to the territory in 1884. Realizing, apparently, the possibility that those who had risked so much in establishing their homes in this then well-nigh unknown country might not reap the fruits of their labor, and for the purpose of protecting them in their property rights, the Congress passed [the Section 8 proviso of the 1884 Act]".

See also *Northern Lumber Mills* v. *Alaska Juneau Gold Mining Co.*, 229 Fed. 966, 969 (C. C. A. 9, 1916), to the same effect.

The 1884 Act, in other words, referred to all lands in Alaska "actually in use or occupation", not just Indian lands. It referred to the future acquisition of title to "such lands". Unless Congress reversed a fundamental policy, *title* cannot be acquired to the open ocean, or even to tidelands. *Shively* v. *Bowlby*, 152 U. S. 1; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284. The contemporaneous construction of the act by the Secretary of the Interior excluded both tidelands and open ocean from its operation. 4 L. D. 128.[19] And the most recent authoritative construction of the Act indicates that rights under it are personal, not tribal or community rights; the rights of "the individual Indians or other persons who happened to be occupying the lands in 1884". *Miller* v. *United States*, 159 F. (2d) 997, 1005 (C. C. A. 9, 1947). Under no reasonable con-

[19] The regulations under Section 8 of the 1884 Act (4 L. D. 128) issued on July 28, 1885, provided that the rules and regulations of the General Land Office for the United States were to apply. Those general regulations provided that tide lands and ocean waters were to be excluded.

struction of the Section 8 proviso can it be held to have included *any* rights to ocean waters.[20]

Sections 14 and 15 of the Act of March 3, 1891 (c. 561, 26 Stat. 1095, 1100-1101; U. S. C., Title 48, Sec. 358) are likewise inapplicable here. Section 15 may be quickly disposed of; it created the Annette Island Metlakahtla Reservation (see pp. 64-65, *infra*) and the natives of Karluk can not possibly derive any rights under that section. Section 14, on which petitioner appears to rely, provides—

> "That none of the provisions of the last two preceding sections of this act [providing for the entry, survey, and sale of land in Alaska] shall be so construed as to warrant the sale of any lands . . . to which the natives of Alaska shall have prior rights by virtue of actual occupation."

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[20] Heckman v. Sutter, 119 Fed. 83, 128 Fed. 393 (C. C. A. 9, 1902, 1904), which is cited by petitioner (Br. p. 16), relates solely to tidelands, not to ocean waters. In that litigation the court below held that by virtue of the 1884 Act, an occupant of the upland area on the banks of a stream was entitled to an injunction to protect a right-of-way across the beach to the fishing area off the mouth of the stream, and the operation of a beach seine at the mouth of the stream. Even as respects tidelands, which are not involved in the present case, the lower court in the *Heckman* case stated (1 Alaska at p. 197): "It is not intended that this right of way shall give the complainants exclusive rights of fishing upon the tide flats, but it is intended that in pursuing their vocation in taking fish from the deep waters or along the tide flats in going and returning to and from their upland holdings that they shall in no wise be interfered with or hindered by other fishermen." And as the court below pointed out (128 Fed. at p. 397), if the reasonable exercise of the upland owner's right of fishing "requires the clearing and use of a small portion of the tide lands, there seems nothing even unjust in protecting such possession against the invasion of a rival in the business." The result in the case might well have been the same had there been no statute involved.

applicable to Alaska at the time, in part because the natives were not sure how it would affect them." This statement contrasts with that of the Committee on Indian Affairs in its report on the bill (H. Rep. No. 2244, 74th Cong., 2d Sess.), which shows what Congress understood the act to be. The report stated (p. 2):

> "This bill does not require an additional appropriation. It merely seeks to make effective the so-called Wheeler-Howard Act now largely inoperative in Alaska because seemingly by inadvertence the Secretary of the Interior was not authorized to complete the incorporation of Indian tribes in Alaska after these people had fully complied with the provisions of the Wheeler-Howard Act, that is to say, while sections of the said act (namely 9, 10, 11, 12, and 16) provide a way for the Alaskan Indians to organize and petition for the benefits of the act, the omission of section 17 creates a stalemate for it is this section that authorizes the Secretary of the Interior to issue the charter, a condition precedent to a loan.
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> * * * * *
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> Section 17 authorizes the Secretary of the Interior to issue the charters without which the loans provided for under section 10 may not be granted. It seems plain that this section was inadvertently omitted when the Wheeler-Howard Act was rewritten and passed in the turmoil of the last days of the Seventy-third Congress (June 18, 1934).
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> * * * * *
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> "The report of the Secretary of the Interior on this bill, dated March 4, 1936, succinctly sets out the controlling reasons for the enactment of the bill. Those reasons, quoting from the report, briefly are:
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> "'In this list (of sections now extended to Alaska), there is one omission (sec. 17) the correc-

> tion of which is basic to the satisfactory operation of the law in the Territory of Alaska and to the welfare of Alaska natives. Section 17 should be included. * * * The operation of section 10 is dependent upon section 17, which stipulates the method by which a tribe may secure a charter. * * * Clearly, this is an unintentional omission. Its effect, nevertheless, so far as Alaska natives are concerned, is to nullify the intent and purpose of that part of the act designed to aid Indian communities to obtain something of economic security. * * * In analyzing the provisions of H. R. 9866, it appears that nearly all of the remaining stipulations are necessary for the proper correction of this omission.' "

It is apparent from the committee report that Congress relied on the assertion of the Secretary just quoted: "In analyzing the provisions of H. R. 9866, it appears that nearly all of the remaining stipulations are necessary for the proper correction of this omission [of Section 17]". The report, after quoting that portion of the Secretary's letter, states (p. 2):

> "Quite different is the situation in the United States proper where reservations already exist about which the tribes might organize for the purposes of this act. Not so in Alaska. The Secretary of the Interior therefore supports paragraph 2 of the bill as being necessary not only to the formation of chartered communities but also to protect projects begun under the provisions of the act. The Secretary says: 'Reservations set up by the Secretary of the Interior will accomplish this.' "

The Secretary himself, in his only statement on the meaning of the section as he understood it, told Con-

p. 33) are the seines on which the Karluck natives, and others, work as employees of the Alaska Packers Association (R. 309). It furnishes them now, as it has in the past, with living quarters as well as fishing gear. It pays them on a piece basis (so much per fish) at a scale fixed by union negotiations (R. 308). The Alaska Packers Association itself owns, at Karluk, a very large private tract including all of Karluk Spit, at the mouth of the river, from which the seine fishing is done (see map in Appendix, *infra*), and maintains there a radio-telephone station, an electric light plant, a cold storage plant, a commissary (the only commercial facility at Karluk) and even owns and rents to the United States the school building and living quarters for the teachers (R. 310-311). These facts, stated by respondents' witness Jones, were confirmed by the respondents' witness King (R. 235-236), and by petitioner's witnesses Ellanak (R. 353-354) and Malutin (R. 361-362), both natives of Karluk. Respondent Grimes also testified that since 1908, and even earlier, native Indian residents of Ouzinkie, 75 miles from Karluk, had fished at Karluk, and that he himself had employed mostly Ouzinkie natives on the boats he had sent there to fish (R. 262).

These are the undisputed facts shown by the record. Petitioner has not referred to them; rather, he has attempted to contradict them by citations to other sources. An examination of those sources will not support the conclusion which petitioner draws.

For example, at pp. 25-26 of his brief, petitioner states:

> "Nor were these fishing activities of the Karluks limited to taking fish exclusively for their own consumption. They were commercial fishermen. As early as 1795, the Karluk natives are reported to

have engaged in commercial fishing transactions with the Russians."

Bancroft's *History of Alaska* is cited as authority.

Here are the facts, as revealed by secondary sources, including Bancroft.

Captain Shelikof, who established the first Russian colony in Alaska in 1784, spent the winter of 1785 at Karluk with his Russian followers, and established a fishery or saltery on Karluk Spit. The strait on which Karluk is located is named for him—Shelikof Strait. Bancroft, H. H., *History of Alaska*, 1730-1885 (1935) p. 228; Andrews, C. D., *The Story of Alaska*, p. 45. Shelikof later received a charter from the Russian czar and formed the Russian-American Company, which continued to occupy and improve the fishery or saltery at Karluk. It was visited by the monk, Gedeon, in 1804. See Appendix, *infra*, pp. 91-92. The Russian-American Company used it as a source of supply of dried fish, or "yukola".[21a]

Bancroft's authoritative work, which petitioner cites, shows that it was the Russians who controlled and op-

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[21a] Petitioner states "More than a century ago it was recorded that in one season at Karluk 300,000 red salmon were prepared as 'yukola' ". He cites, as authority, *Statistical Review of the Alaska Salmon Fisheries*, U. S. Dept. of Commerce, Fisheries Doc. No. 1102, p. 664. For the convenience of the Court, we reprint p. 664 of that document in the Appendix, *infra*, pp. 90-91. It deals with commercial fishing and canning activities of white men at Karluk since 1867. The statement on the 300,000 salmon is derived from an early Russian work cited in the footnote on p. 664. We have also reproduced that statement in the Appendix, *infra*, pp. 91-92). It demonstrates that the Russian-American Company occupied and controlled the Karluk fishery as early as 1804, and that the native inhabitants were engaged, as they since have been, as workers and not as proprietors.

erated the fishery. The rights of the native inhabitants were given scant recognition by them. Fish taken at Karluk were taken under the direction of the Russian-American Company and were disposed of pursuant to the orders of that company. The native inhabitants were employees or something less than employees.[22]

On October 18, 1867, the day Alaska was transferred from Russia to the United States, the predecessors of a company known as the Alaska Commercial Company purchased all of the assets of the Russian-American Company including those at Karluk. Johnson, S. P., *Alaska Commercial Company*, 1868-1940, pp. 5, 7, 8, 15; Andrews, *supra*, pp. 127, 128. Commercial fishing by Americans began at once. Three parties were engaged in 1867 in salting salmon at Karluk, and the Alaska Commercial Company commenced salting operations there in 1870. In 1882 the Karluk Packing Company

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[22] Pages 230 and 357 of Bancroft, referred to by petitioner as authority for his statement that the natives engaged in commercial transactions with the Russians in 1795, do not support that conclusion. At p. 230, Bancroft details the instructions which Captain Shelikof left when he returned to Russia in 1786; they included a requirement that 30 Russians stay at Karluk. At page 357, there is a footnote which reads:

> "Two other bidarka fleets mustering 257 boats assembled during the same year at the village of Karluk, and after obtaining supplies of dried fish were despatched in the same direction. Each bidarka carried from 100 to 125 fish, but this food was used only in case of actual necessity. As a rule, fresh fish were caught and birds killed at every halting place. Klebnikof Schizn. Baranova, 34-5."

The two pages merely emphasize the position of domination which the Russian-American Company occupied with respect to the fishery at Karluk.

(which later was merged with the Alaska Packer's Association referred to *supra*, pp. 55-56) converted the saltery into a cannery and began operation at Karluk Spit. See Johnson, *supra*, pp. 5, 7, 8; 15; Moser, J. F.: *Salmon and Salmon Fisheries of Alaska* (U. S. Gov't., 1899) p. 144; Murray, Joseph, *Origin and Development of the Alaska Salmon Fisheries*, in *Seal and Salmon Fisheries and General Resources of Alaska* (1899) Vol. 2, p. 424.

Fish hatcheries for the artificial propagation of salmon were built, maintained and operated within the boundaries of the present reservation as early as 1891, by concerns engaged in salmon canning at Karluk. One such hatchery was built by the Alaska Packers Association in 1896 and operated each year until 1916. *Alaska Fisheries and Fur Industries in 1916*, Bur. Fisheries Doc. No. 838, Appendix II to *Report of U. S. Commissioner of Fisheries for 1916*. In 1900, in passing a special act to enable the Karluk Packing Company (the predecessor of Alaska Packers Association) to patent a claim extending more than 160 rods along the waterfront of Karluk Spit, the Committee on Public Lands (H. Rep. No. 34, 56th Cong., 1st Sess.) stated that the Karluk Packing Company—

> "was engaged in the meritorious business of producing an article of food supply extensively used in the United States and exported to other countries as well. * * * It further appears that some 600 men are employed at these canneries in each season; that an expensive salmon fish hatchery, involving an original cost of $40,000, is maintained by these parties on the Karluk river, wherefrom millions of salmon are annually spawned and sent down to restock the fish supply in the adjacent waters, and being the only hatchery thus maintained in the Alaskan waters by private enterprise."

In 1890, the Superintendent of the Census, Robert P. Porter, summarized the early history of the Karluk fisheries in his *Report on Population and Resources of Alaska at the Eleventh Census, 1890* (Dept. of Interior, G. P. O. 1893). We have reprinted his statement in full in the Appendix, *infra*, pp. 92-94), together with the census enumeration, and a photograph and maps of Karluk Spit as it then appeared.

In 1897 a dispute arose over fishing rights at Karluk which reached the courts. *Pacific Steam Whaling Co.* v. *Alaska Packers Assn.*, 138 Cal. 632, 72 Pac. 161. The Association claimed that by virtue of its exclusive use of the waters of Karluk for more than five years it had acquired a permanent exclusive fishing right by prescription. The court denied that exclusive use could give a prescriptive right to ocean waters.

This summary, though longer than we should have liked, should serve to show that whether we rely on the undisputed facts in the record, or go to the published historical sources, we find no support for the assumption which underlies petitioner's argument on the 1884 and 1891 Acts—that the native inhabitants of Karluk had exclusive commercial fishing privileges in the ocean there. The plain fact is that they did not; since "time immemorial", as petitioner puts it, the ocean waters sought to be included in the Karluk Reservation have been fished in by Russians, by Americans, by the residents of other native villages of Alaska, as well as by Karluk natives. No matter what construction is given to the proviso of Section 8 of the 1884 Act, or of Section 14 of the 1891 Act, petitioner simply cannot demonstrate that the Karluk natives had exclusive use or occupancy or even claim of such to the ocean waters here involved.

4. MOREOVER, IN THE CONTEXT OF THE 1936 ACT, THE WORDS "AREA OF LAND" DO NOT WARRANT THE INCLUSION OF OCEAN WATERS

Perhaps, in the detail of the last two points, the Court may have lost sight of the fact that petitioner seeks to rely on the 1884 and 1891 Acts *only* to be able to say that the words to be construed are "area of land" as used in categories (a) and (b) (*supra*, p. 42), rather than "public lands" as used in category (d). Even were petitioner to surmount the obstacles which the language of the 1884 and 1891 Acts, and the facts of history, place in his way, he would, in our judgment, still fail. We believe that when Congress used the word "land" in the 1936 Act, it did *not* mean ocean waters.

We recognize that, in this respect, we depart from the court below, but we venture to think that court gave too little weight to the nature and legislative history of the 1936 Act, which we set out below (pp. 67-74), and too much weight to the assumed analogy to earlier cases. We will not dwell on the point, since in all probability the Court will not reach it, but we will state our reasons briefly.

We may begin by reference to certain basic principles of construction of statutes yielding water rights. When the United States acquires new territory, the title to the bed of all navigable waters is acquired "for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory." *Shively* v. *Bowlby*, 152 U. S. 1, 57; *United States* v. *California*, 332 U. S. 19.[23] These principles of

[23] When the state is finally created, a trusteeship continues in the hands of the state, for the people of the state, that they may enjoy the rights of commerce, navigation and fishery. Illinois Central R. R. v. Illinois, 146 U. S. 387, 452; Hardin v. Jordan, 140 U. S. 371, 381. United States v. California, supra, holds that lands under ocean waters below low water mark remain in the United States even after statehood.

course, apply to Alaska. *Cf. Rassmussen* v. *United States*, 197 U. S. 516; U. S. C., Title 48, Sec. 411.

This is, of course, not an absolute presumption. The United States may grant titles or rights to such areas during the territorial period, and has in fact done so "in exceptional instances when impelled to particular disposals by some international duty or public exigency". *Shively* v. *Bowlby, supra*, 152 U. S. at p. 55.[24] Nevertheless, the presumption does have certain consequences.

First, it is well settled that public grants of riparian lands do not convey any title to the tidelands or lands underlying navigable waters. *Shively* v. *Bowlby, supra*. In contemplation of law, as well as realistically, the land lying below the line of ordinary high tide or high water mark is "not land, but water". *Baer* v. *Moran Bros. Co.*, 2 Wash. 608, 27 Pac. 470, 471 (1891), *aff'd*, 153 U. S. 287; *De Meritt* v. *Robison, Land Com'r.*, 102 Tex. 358, 116 S. W. 796, 797 (1909); *Money* v. *Wood*, 152 Miss. 17, 118 So. 357, 359 (1928).

The second consequence, which is in truth no more than a generalization of the first, is that the United States has never disposed of such areas by *general* legislation. In *Shively* v. *Bowlby* the Court pointed out that the United States (152 U. S. at p. 58)

> "* * * may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. *But they have never done so by general laws;* * * *." (Italics supplied.)

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[24] Typical of such situations are Damon v. Hawaii, 194 U. S. 154, and Carter v. Hawaii, 200 U. S. 255 (recognition of prior Hawaiian grants); Knight v. United States Land Association, 142 U. S. 161 (recognition of prior Mexican grants); Alaska Pacific Fisheries v. United States, 248 U. S. 78 (*infra*, pp. 64-65).

See also *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 17; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284; *Jackman* v. *Atchison T. & S. F. Ry.*, 24 N. M. 278, 170 Pac. 1036, 1050 (1918).

Even when the United States legislates with reference to Indians, disposals of tide lands and lands under navigable waters are not lightly to be inferred, and are not made by general laws. For example, in *United States* v. *Holt State Bank*, 270 U. S. 49, the United States contended that a grant of "land" or "lands" to an Indian tribe for a reservation had resulted in passing title to the bed of a lake within the reservation to the Indians. The Court denied the contention, holding that disposals of submerged lands by the United States during the territorial period "should not be regarded as intended unless the intention was definitely declared or otherwise made very plain" (270 U. S. at p. 55). To the same effect see *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U. S. 77, 86; *Vickery* v. *Yahola Sand & Gravel Co.*, 158 Okla. 120, 12 P. (2d) 881, 883-884 (1932); *United States* v. *Mackey*, 214 Fed. 137, 146 (E. D. Okla. 1913), *rev'd*, on other grounds, 216 Fed. 126 (C. C. A. 8, 1914).[25] When the issue is not what Con-

[25] Petitioner suggests that the *Holt Bank* case may be distinguished as involving a treaty reservation, because that was "more like a disposal". He unwittingly impales himself on a dilemma: if the ocean waters are an "area of land" within the meaning of the 1884 or 1891 Acts, the Indians certainly have a compensable interest; preservation of that interest was the reason for those acts. On the other hand, if the ocean waters are "public lands" in which the Karluk natives have no compensable interest, then the 1884 and 1891 Acts can have no application.

It is only fair to add that we regard the difference between a "treaty" reservation and an "executive" reservation as immaterial to the meaning of the word "land" as applied to ocean waters. The public, for whom the waters are held in trust, is equally affected either way.

gress has done directly, but what Congress had delegated to be done administratively, as here, it certainly should be very clear indeed that authority has been conferred so to deal with ocean waters as to deprive the general public of its normal privileges therein. Such authority should never be inferred.

The 1936 amendment is, of course, a "general law". Petitioner states (Br. p. 24) that the Act "is generally applicable to all Indians in Alaska." It does not deal with *this* reservation, but generally with the inclusion of Alaskan lands in Indian reservations. The foregoing decisions establish not only that Congress has never, at least up to this time, made such a statute a vehicle for the disposition of ocean waters, but also the strong presumption of statutory construction that "waters" are not included within "lands" unless the contrary is "definitely declared or otherwise made very plain". In the instant case there is no such declaration, no such clarity. Indeed there is not even a scintilla of evidence on the face of the statute, nor in its legislative history which we discuss below, pp. 67-74, that Congress meant by the 1936 Act to authorize the Secretary of the Interior in his discretion to make any or all of the Northern Pacific Ocean into Indian reservations.

The court below and petitioner cite *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78; and *Moore* v. *United States*, 157 F. (2d) 760 (C. C. A. 9, 1946), *certiorari denied*, 330 U. S. 827, as authority for the proposition that when Congress uses the term "land" it intends to include ocean waters. This case, however, is wholly different. The *Fisheries* case involved Section 15 of the Act of March 3, 1891 (26 Stat. 1101), by which Congress itself created the reservation described as "the body of lands known as Annette Islands". Such a statute is specific, not general, and under the rule of

Shively v. Bowlby, supra, may, if appropriate, be interpreted as including water. Here, on the contrary, we are interpreting a general statute applicable anywhere and everywhere in Alaska. Moreover, the language of the statute is wholly different than in the instant case; the phrase under construction in the *Fisheries* case was not simply "land", but "the body of lands known as Annette Islands". That phraseology is well calculated to include surrounding waters. The simple term "land" is quite different. In the *Fisheries* case the Court could say (p. 89):

> "It [Congress] did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland—in other words, as descriptive of the area comprising the islands."

No such line of reasoning could possibly apply in the present case.

The *Moore* case involved only tidelands and a navigable river; there was no claim there, as there is here, that the reservation included ocean waters. Moreover, in that case the court was again construing a specific treaty dealing with a specific group, the Quillayute Indians, living at the mouth of one river. Under all the circumstances of that case, the clause in a treaty referring to a "tract or tracts of land sufficient for their wants" was held to include the bed of the river and certain adjoining tidelands.

What, then, by way of summary, do we have, as respects the language of the 1936 Act? The first indication that it does not give to the Secretary the power to

extend reservations into the ocean is that there is certainly no specific grant of such an authority. Congress, had it wanted to do so, could have given the authority in question by the addition of two or three words. If we are to assume that Congress had the intention which petitioner imputes to it, we must also assume that Congress was almost incredibly clumsy in its expression.

But all the internal evidences indicate that Congress cannot fairly be charged with such clumsiness. Congress, we believe, said exactly what it meant—the Act permits inclusion within Indian reservations of certain areas of *land* within the coastal boundaries of Alaska. Thus a reservation, to be effective, requires approval of the Indians or Eskimos "resident thereof". For petitioner's theory to be consistent, he must contend that the Karluk Indians are "residents" of the ocean. Moreover, the last clause of Section 2, reserving all claims, locations, and entries under the laws of the United States, is also draftmanship consistent only with an eye to dry land.

Moreover, the effect of petitioner's construction of the act puts no limits on the Secretary's powers. He finds a basis here in a one-third acre school yard to set aside for 57 adults some 35,000 acres of land and a 15-mile segment of the ocean from which hundreds of non-Karluk fisherman are excluded with the loss of millions of dollars of investment built up there over a period of over a century. What he would find as a basis for action elsewhere is of course purely speculative, but petitioner must necessarily concede that he believes Congress was willing, and meant by this choice of words, to give the Secretary of the Interior power, in his discretion, to put the entire ocean for three miles off the coast of Alaska plus the continental shelf into Indian

reservations.[26] And as the greatest unlikelihood of all, he must believe, that Congress, which had it wished to could have conferred this power by the addition of a few simple words, left those words out because it thought that all these consequences would follow from the use of the words "public land".

We submit that by any common sense "natural, straightforward and literal"[27] interpretation of the 1936 Act, the ocean may not be put into Indian reservations at the discretion of the Secretary of the Interior.

C. THE LEGISLATIVE HISTORY OF THE 1936 ACT PRECLUDES INCLUSION OF OCEAN WATERS IN AN INDIAN RESERVATION.

The construction of the 1936 Act, however, need not be resolved solely on its words, aided by the principles of interpretations which we have already discussed. Even though that alone would be ample, we have for the 1936 Act significant legislative history, which also compels the same conclusion.

The 1936 Act is an amendment to the Wheeler-Howard Act of 1934 (c. 576, 48 Stat. 984). The Wheeler-Howard Act had as its basic purpose the permitting of an experiment in Indian communal ownership of property under the guidance of the Secretary of the Interior. It conferred no power to create reservations. Section 13 of that Act made certain sections applicable to the Territory of Alaska.

Petitioner now states (Br. p. 29) that "Most of the provisions of the Wheeler-Howard Act were not made

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[26] United States v. California, *supra*; Executive Proclamation No. 2667, 10 F. R. 12303 (1945).

[27] Frankfurter, "Some Reflections on the Reading of Statutes", 47 Col. L. Rev. 527, 536.

diction. The penalties of Section 6 of the White Act include a $5,000 fine on *each* "person, company, corporation, or association" involved, plus loss of boats, gear, and all fish taken. Moreover, all gear, including boats, and all fish caught, are subject to summary seizure. A business cannot function under such a cloud. The exercise or threat of exercise of these sanctions would stop all fishing by, or for, respondents in the Karluk waters, and compliance with the invalid regulation would thus be compelled (R. 128, 146, 182, 190, 191, 197, 220, 227). Since, as is shown above, respondents' canneries at Kodiak Island depend heavily on this supply without any available alternative, the enforcement of the regulations threatens the survival of the canneries. In these circumstances, equity has power to determine whether the regulation requiring these results is valid.

The existence of the threat of enforcement, and of the ruinous consequences of the enforcement were it to occur, are of course matters of fact. On both, the District Court has made findings (R. 35-36) and these findings have been approved by the court below. They will not be reviewed again here. *United States* v. *O'Donnell*, 303 U. S. 501, 508.

CONCLUSION

We submit, therefore, that the judgment of the court below should be affirmed. Petitioner has asserted throughout the pages of his brief so many arguments, and made, in the course of those arguments, so many assertions, and colored the whole with so many inferences and implications, that we have not even attempted to deal with each item individually. Those which we deemed important we have covered; the lack of reference to others is no more than a judgment that

they are wholly irrelevant to the principal issues in the case.

Respectfully submitted,

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gress in his letter to the Committee (H. Rep. No. 2244, *supra*, p. 4):

> "Section 2 of the bill, which gives to the Secretary of the Interior power to designate certain lands as Indian reservations is, therefore, a logical sequence of the legislative history regarding Indian lands in Alaska and *provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to* those *Indians and Eskimos of Alaska* who occupied established villages." (Italics supplied.)

There were no hearings on the bill. The Senate Report is substantially identical with the report of the House (S. Rep. No. 1748). Nothing appears *anywhere* in the legislative history which states, or even suggests, that when Congress used "public lands" or "land" in Section 2, it had in mind ocean waters. We utterly fail to see how petitioner can say (Br. p. 32) that "Congress in the 1936 Act established the policy of protecting the Indians' fishing grounds from usurpation by the salmon industry." On the contrary, the 1936 amendment, beyond the shadow of a doubt, was, and was intended to be, a minor, technical, non-controversial amendment to correct an inadvertent omission which denied to the Indians and Eskimos of Alaska the financial benefits of the Wheeler-Howard Act.

Petitioner, of course, cannot find a line, or even a word, in the legislative history of the act to show that Congress, or the Committees, or even any one member of Congress, ever thought that he was giving the Secretary of the Interior power to put ocean waters into Indian reservations. Instead, presumably with the thought that he must show *some* legislative history, petitioner falls back on the history of many *other* statutes, and concludes that Congress knows that fish-

eries are "the basis of the economic life of Alaska Indians" (Br. p. 30).[28] Congress, we can also assume, knew that the fishing industry was by far the chief industry in Alaska. Petitioner proves by these references to the legislative history of other bills, if he proves anything, only that if Congress intended to legislate on so vital a subject, it is more than passing strange—it is incredible—that no member of Congress (nor the Secretary) would have seen fit to comment on that fact.[29]

Disposition of the public domain is a matter of vital concern to the nation, and Congress does not legislate in this vital field by happenstance. Thus in his testimony in favor of the original Wheeler-Howard Act, Commissioner Collier, Head of the Bureau of Indian

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[28] Petitioner somewhat overstates his case, however. He argues (p. 24) that Congress has repeatedly exempted the Indians from acts restricting fishing. None of the acts he cites carries any such exemption. The Act of June 14, 1906 (c. 3299, 34 Stat. 263) prohibited *aliens* from fishing, and exempted Alaska natives, who were then not citizens and not eligible for citizenship. Alaska natives are now, of course, citizens. The Act of June 6, 1924 (c. 272, 43 Stat. 465) exempted the taking of fish for local food requirements or for use as dog food. It applies equally to Indians and whites. The Act of April 16, 1934 (c. 146, 48 Stat. 594) has an exemption for "native Indians and bona fide permanent white residents." See footnote 14, *supra*.

[29] Petitioner seeks to give the impression (pp. 25-27) that Congress passed the 1936 Act with Karluk fisheries, in particular, in mind. Not only did Congress not have fisheries in mind at all, as we have shown, but the act is not a special act for Karluk, but an act which, on petitioner's view, applies to all the waters of Alaska. We should add that petitioner's discussion of the Karluk fisheries in this connection reflects his erroneous view of the history of these fisheries over the past 150 years, which we have already discussed above (pp. 55-60, *supra*).

Affairs, stated (Hearings on S. 2755, 73d Cong., 2d Sess., p. 35):

> "I want to make it clear regarding the annexation of public domain by Indian reservations. That is a matter for Congress. This bill does not affect that. It is not an annexation of public domain."

Such testimony reflects a policy, and a policy which would scarcely have been upset to the point of giving the Secretary of the Interior suzerainty over the sea without a word of hearing or debate.

As the Secretary of the Interior himself wrote in his letter in support of the 1936 amendment, it was "a logical sequence of the legislative history regarding Indian lands in Alaska", and we may assume that the usage of Congress in 1936 in amending the Wheeler-Howard Act was the same as the usage of Congress in passing the original Wheeler-Howard Act in 1934. Analysis of that statute shows that in this "sequence of the legislative history", land cannot conceivably mean ocean water.

We submit two items of proof: First, the word "land" or "lands" appears twenty-nine times in the Wheeler-Howard Act. It is used in nine of its nineteen sections. In each of those instances, it is inconceivable as a matter of common sense, as well as of legal analysis, that the word could have been used so as to include ocean waters.[30] We cannot believe that Congress used the word "lands" twenty-nine times in a manner excluding ocean water and then, in a technical amendment to the Act, and without a word to indicate change of intent, suddenly gave not only that word

[30] The term "land" is used in the following contexts in the Wheeler-Howard Act:

but also the more explicit phrase "public lands" a wholly different meaning. The presumption is entirely in the other direction; whenever possible a word will have but one meaning in one statute or in closely related statutes. *United States* v. *Cooper Corp.*, 312 U. S. 600, 606-607, and cases cited; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 396, and cases cited.

Second, when Congress wanted, in the Wheeler-Howard Act, to give the Secretary jurisdiction over water rights, it said so. Section 5 of the Wheeler-Howard Act authorizes the Secretary of the Interior to acquire lands. The section, having referred to land, continues specifically to refer to "water rights". In short, when Congress meant to give the Secretary of the Interior power in behalf of Indians over water rights it specified them and defined the power which it was granting.

The Court must also be aware that, if petitioner is correct, this seemingly innocuous and undiscussed minor amendment to the Wheeler-Howard Act has given the Secretary of the Interior a power of life and

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Reference	Number of Uses	Sections
Lands in severalty and in trust	4	1, 2 & 4
Lands previously indisposable	2	3
Reclamation lands	1	3
Papago & Navaho lands	5	3 & 5
Usage related to foregoing	1	3
Sale and exchange in re restricted lands	7	4 & 17
Land purchase in specific distinction from water	7	5 & 7
Sale, etc. of lands	2	16
Total	29	

death over the Alaskan salmon industry. There is no limit at all put upon his power, as petitioner interprets it, to include any or all of the fisheries of Alaska within Indian reservations.[31a] We submit Congress would not have taken such a step without at least discussing its significance on the floor of the Congress and without giving the industry a chance to be heard. Congress has previously dealt with such legislation only after long hearings and long debate. And justly so, for Alaskan waters produce an annual pack of salmon worth about $60,000,000, which makes it far and away the chief industry of Alaska. (Report of Sec. Int. on H. R. 3859, 80th Cong., 1sf Sess., June 11, 1947.) The basic fishery statute—the White Act—was passed after the President of the United States personally inspected the situation in Alaska, and after full hearings and long debate.

It is unbelievable that Congress should have accorded to the Secretary of the Interior in this casual manner a *carte blanche*. One would have to believe that Congress had thus cavalierly reversed—without debate, without discussion, without hearing, without reference to the fact that it was doing so—two long-established policies, the one against disposing of ocean waters by general legislation, and the other against summary disposition of Alaskan fishing rights. We simply do not believe that it did so.

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[31] Petitioner challenges this statement (Br. pp. 31-32) by conceding that there must be some *land* to which the water is adjacent in every reservation, reserved for or occupied by Indians. The significance of this may be judged from the fact that the land to which this Karluk ocean is adjacent is a school yard, 35 acres in size. See ftn. 15, *supra*. *Anything*, in petitioner's view, will do.

D. THERE IS NO SIGNIFICANT ADMINISTRATIVE CONSTRUCTION OF THE 1936 ACT.

Petitioner recites an Acting Solicitor's Opinion of April 19, 1937, which advised the Secretary of the Interior that he could include ocean waters in an Indian reservation under the 1936 Act. The opinion was based largely on the premise that "public lands" was synonymous with "public domain" and tide lands and ocean waters were "public domain"; and that the Act of 1936 was not "general legislation" within the rule of *Shively* v. *Bowlby, supra.* Perhaps because of the Secretary's own grave doubts no administrative action was taken.[32] The *first* administrative construction of the 1936 Act to include ocean waters was Public Land Order No. 128, setting up the Karluk Reservation, in May, 1943. The other administrative acts recited by petitioner (Br. p. 36) consist of three other reservations created later in 1943 and in 1946—none of them, incidentally, including any waters used for commercial fishing.

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[32] The Solicitor, in an opinion to the Secretary dated September 14, 1937 (No. 31634) indicates one reason why no administrative action was forthcoming until six years later. He there supports the General Land Office in its contention that several huge reservations of over 1,000,000 acres each, with large ocean areas included, be not approved as recommended by the Indian Office. The Solicitor's reasoning is interesting, in view of the dependency of the Karluk Reservation on the 0.35 acre school site: "The extent of the adjacent area which may be included in the designation as an Indian reservation of an existing reserve must depend upon the needs of the reserve to which the area is to be added. It should not be so extensive as to exceed the requirements of the occupants of the existing reserve. Otherwise, it would be for all intents and purposes a separate reservation." The opinions of the Solicitor's office do not indicate when that reasoning was overruled.

There can scarcely be a significant administrative construction based on a legal opinion which was not followed by administrative action for six years, and which was then immediately challenged. We think it far more significant that in 1944 a Senate Committee charged with responsibility for legislation dealing with Alaskan fisheries specifically rejected the view of the Department. S. Rep. No. 733, 78th Cong., 2d Sess., p. 6, quoted at pp. 30-31, *supra*. See *Sioux Tribe* v. *United States*, 316 U. S. 317, 329-330.

E. THE 1936 ACT CANNOT BE CONSTRUED AS IN CONFLICT WITH THE WHITE ACT.

The final item of proof against construction of the 1936 Act is its patent inconsistency with the basic policy of the White Act. That inconsistency we have already discussed in Point I, together with petitioner's final effort to extricate himself by the argument that the 1936 Act effected an implied repeal of the White Act.

The significance, here, is that this casual amendment in 1936 of an omission in draftsmanship of the original Wheeler-Howard Act, passed, as we have seen, with no hearings, no discussion, no debate, and *no mention of fish or fishing*, not only must, on petitioner's theory, be the first general grant of ocean waters in one hundred and fifty years, but also a complete *volte face* on the fundamental premise on which Alaskan salmon fishing has been dealt with since 1924—that there should be *no exclusive fishing rights*. We have already, at pp. 67-74, *supra*, indicated that, so far as every indicia of Congressional intent shows, the 1936 amendment was thought to be, and was treated as, a purely Indian matter. We concede that repeals by implication are *possible*, but petitioner, at the same time,

should be willing to concede that they are and always have been looked upon with disfavor. *United States* v. *Borden Co.*, 308 U. S. 188, 198-199, and cases cited. When the argument for implied repeal requires a reversal of a basic, long-standing policy arrived at after long debate by what can be truly called a casual legislative act, a repeal by implication is simply not credible.

III.

The District Court Had Jurisdiction to Hear the Cause and Grant Equitable Relief.

Petitioner makes two jurisdictional objections: that the Secretary of the Interior was an indispensable party, and that respondents are trespassers not entitled to aid from an equity court. Neither point warrants extensive discussion.

A. THE SECRETARY OF THE INTERIOR IS NOT AN INDISPENSABLE PARTY.

This Court, in *Williams* v. *Fanning*, 332 U. S. 490, has recently held that in a suit against the local postmaster to review a fraud order, the Postmaster General was not an indispensable party. The opinion points out that the superior official is not indispensable "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." The court pointed out that in cases in which the superior officer had been held to be indispensable, the suit sought to require him to take some affirmative action—to issue a land patent (*Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28); to delegate additional authority to issue permits (*Gnerich* v. *Rutter*, 265 U. S. 388);

or to pay out money (*Webster* v. *Fall*, 266 U. S. 507).

The present case is squarely within the *Williams* v. *Fanning* rule. The relief requested is against the threatened imposition of the drastic White Act sanctions, and petitioner is the one who makes that threat. As the Court said in *Williams* v. *Fanning*: "If he desists in those acts, the matter is at an end."

Petitioner attempts to avoid the *Williams* v. *Fanning* case by arguing that the challenged regulation, Section 208.23(r), can be read as *two* regulations: the first sentence, a complete prohibition of commercial fishing and by itself valid; the second sentence, the exempting of the Karluks and their permittees. The argument, therefore, is that respondents seek a judgment that they may fish in the area, rather than relief against action under an invalid regulation. *Dow* v. *Ickes*, 123 F. (2d) 909 (App. D. C. 1941), *certiorari denied*, 315 U. S. 807, is relied on as analogous.

This argument is not only fallacious as a matter of logic, but it also makes a nullity of the limitations of the White Act. The regulation is a whole. Substance, not style or typography, determines legal validity. A regulation cannot say in one sentence that no one may fish, and in a second sentence that one group and their temporary permittees *may* fish, without creating an exclusive right of fishery. Such a regulation is not of general application, and denies a fishing right to some where fishing is permitted to others. If the limitations upon which Congress put so much emphasis and placed so much reliance mean no more than petitioner suggests, they are impotent indeed; the Secretary need only, in the first sentence of his regulations, forbid all fishing in Alaska, and then grant fishing rights to individuals, companies, groups, or in any other forbidden way that he might select.

But the fallacy cuts even deeper. Respondents are not seeking an injunction giving them a right to fish in violation of the White Act.

They seek, rather, an injunction in the terms of that Act—an injunction restraining petitioner from interfering with their fishing in "waters where fishing is permitted by the Secretary" under the regulation. That right is specifically guaranteed them by the Act. *Freeman* v. *Smith*, 44 F. (2d) 703, 704 (C. C. A. 9, 1930). If the first sentence of subsection (r) stood alone—if the area were in fact closed to all for conservation reasons—we would have a different regulation and a different case. *Dow* v. *Ickes*, as petitioner's quotation indicates (p. 53), was a suit to require the "opening of new sites or additional general areas for fishing". It lends no support to the dialectic attempt to read one sentence of the subsection on respondents to deny them rights, and another sentence of the subsection on Karluk natives to give them rights.

Petitioner asserts that this was an exercise of Secretarial discretion because the Secretary might have issued different orders than he did. (Br. pp. 54-55.) So he might. But respondents contend that by no form, choice, or alternative could he issue any order which simultaneously excluded respondents from the area in question and granted exclusive fishing rights to someone else. Petitioner has suggested no possible valid road to that end.

Petitioner further contends that the Secretary must be joined because he, and not petitioner, handles Indian affairs. But respondents are not seeking to enjoin the handling of Indian affairs, they are seeking to enjoin the enforcement of particular orders affecting themselves. Petitioner is the vital link in the enforcement process (R. 33, 34). Traditionally and classically such

an action may be brought, not against the policy-making officials, but against the enforcement officials. *Ex parte Young*, 209 U. S. 123, 161.

B. RESPONDENTS ARE ENTITLED TO EQUITABLE RELIEF.

As his Point IIIA petitioner contends that equity "will not thus aid a willful wrongdoer". He further argues that equity will not protect a trespasser, saying, "Even if it be assumed that the remedies of the White Act might not properly be invoked in that area, respondents may not enjoin the invocation of such penalties as a punishment for their trespasses." (Br. p. 56). These contentions are unsound for two reasons:

1. It assumes the point in issue to declare that equity has no jurisdiction because respondents are willful wrongdoers. Whether they are or not is to be determined by this suit. That issue is relevant not to jurisdiction, but to the merits. If, as the respondents contend, the purported reservation of ocean waters is invalid, then respondents are necessarily not trespassers. If the Court should not pass on the point, it drops out of the case for all purposes including the jurisdictional; for by traditional equity doctrine the "clean hands" rule applies only when the misdeed of the moving party involves squarely and precisely the point for which equity is invoked. See Pomeroy, *Equity Jurisprudence*, 5th ed., Section 399. The Act of 1936 and the White Act are quite distinct, and to say that an alleged trespass under the one deprives the respondents of the right to remonstrate against the imposition of the penalties of the other is to make an alleged tresspasser an outlaw, subject without right of effective protest to any penalty or series of penalties that may be culled from the entire criminal code.

2. More important, respondents cannot accept petitioner's argument that, for jurisdictional purposes only, it may be "assumed" that the White Act does not apply. The whole object of this litigation is to demonstrate that neither the Act of 1936 nor the White Act, under both of which the Secretary of Interior has purported to act, can authorize his action. Were petitioner willing to stipulate that respondents would not be subject to the penalties of the White Act, the situation would be quite different. But the respondents are in fact constantly threatened with enforcement of the fishery regulation in question by Fish and Wildlife Service agents working directly under petitioner's supervision and control.

While equity will not ordinarily enjoin the enforcement of a criminal statute or an order issued thereunder, equity can act where the order is invalid and the penalties high, and most certainly where immediate seizure and forfeiture are concerned. Ex parte *Young*, *supra*. When property rights are involved, equity "binds the defendant not to resort to criminal proceedings to enforce illegal demands," *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621, particularly when enforcement will make impossible the continuance of a business in all other respects proper. *Stafford* v. *Wallace*, 258 U. S. 495; *Buenemán* v. *Santa Barbara*, 8 Cal. (2d) 405, 65 P. (2d) 884 (1937). In short, serious jeopardization of property rights combined with high penalties gives equity jurisdiction. *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 217-220.

In this case, respondents' legitimate business in the Karluk area cannot function under the overhanging threat of the enforcement of this clearly invalid order. This is the typical case for the exertion of equity juris-

APPENDIX

THE WHITE ACT, c. 272, 43 STAT. 464, JUNE 6, 1924, AS AMENDED BY c. 421, 43 STAT. 632, JUNE 18, 1929

SECTION 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress: *Provided further*, That the Secretary of Commerce is hereby authorized to permit the tak-

ing of fish or shellfish, for bait purposes only, at any or all seasons in any or all Alaskan Territorial waters.

It shall be unlawful to import or bring into the Territory of Alaska, for purposes other than personal use and not for sale or barter, salmon from waters outside the jurisdiction of the United States taken during any closed period provided for by this Act or regulations made thereunder.

* * * * * * *

SEC. 6. Any person, company, corporation, or association violating any provision of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding $5,000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding $250 for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty.

That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies.

SEC. 7. Sections 6 and 13 of said Act of Congress approved June 26, 1906, are hereby repealed. Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal; but all liabilities under said laws shall continue and may be enforced in the same manner as if committed, and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law em-

braced in, changed, modified, or repealed by this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

SEC. 8. Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by the Act of Congress approved August 24, 1912, "To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes."

ACT OF MAY 1, 1936, c. 254, 49 STAT. 1250.

. . . sections 1, 5, 7, 8, 15, 17, and 19 of the Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes", approved June 18, 1934 (48 Stat. 984), shall hereafter apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the Act of June 18, 1934 (48 Stat. 984).

SEC. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation

by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: *Provided, however*, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote: *Provided further*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.

PUBLIC LAND ORDER 128, MAY 27, 1943, R. 17, 18.

ALASKA

Modifications of Executive Order Designating Lands as Indian Reservation

By virtue of the Authority contained in the Act of June 25, 1910, c. 421, 36 Stat. 847 as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U. S. C., title 43, secs. 141-143), and the act of May 1, 1936, c. 254, 49 Stat. 1250 (U. S. C., title 48, sec. 358a), and pursuant to Executive Order No. 9146 of April 24, 1942: It is ordered, as follows:

1. Executive Order No. 8344 of February 10, 1940, withdrawing Kodiak and other islands, Alaska, for classification and in aid of legislation, is hereby modified to the extent necessary to permit the designation as an Indian reservation of the following-described area;

Beginning at the end of a point of land on the shore of Shelikof Strait on Kodiak Island, said point being about one and one-quarter miles east of Rocky Point and in approximate latitude 57° 39′ 40″ N., longitude 154° 12′ 20″ W.;

Thence south approximately eight miles to latitude 57° 32′ 30″ N.;

Thence west approximately twelve and one-half miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait;

Thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

2. The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean low tide, are hereby designated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Karluk, Alaska, and vicinity:

Provided, That such designation shall be effective only upon its approval by the vote of the Indian and Eskimo residents of the area involved in accordance with section 2 of the act of May 1, 1936, supra; And provided further, That nothing herein contained shall affect any valid existing claim or right under the laws of the United States with the purview of that section.

HAROLD L. ICKES,
Secretary of the Interior.

May 22, 1943

(F. R. Doc. 43-9892; Filed June 19, 1943; 10:58 a.m.)

REGULATION 208.23 (OF WHICH SECTION (r) IS PARTICULARLY RELEVANT).

SEC. 208.23. Waters closed to salmon fishing. All commercial fishing for salmon is prohibited as follows:

(a) Portage Bay, tributary to Alitak Bay: All waters of lagoon at head of southeast arm inside or markers placed at entrance, and all waters in the northeast arm within a line from a marker on the north shore 1 statute mile from the stream in the northeast corner of the bay to a marker on the opposite shore.

(b) Deadman Bay, tributary to Alitak Bay: All waters of Deadman Bay within 1 statute mile of the head of the bay.

(c) Western shore of Kodiak Island: All waters within 1 statute mile of the mouth of Red River.

(d) Karluk River: All waters within Karluk River and within 100 yards of its mouth where it breaks through Karluk Spit into Shelikof Strait.

(e) Uyak Bay: All waters of the bay south of 57 degrees 19 minutes north latitude.

(f) Zachar Bay, tributary to Uyak Bay: All waters of Zachar Bay east of 153 degrees 44 minutes west longitude.

(g) Spiridon Bay (or northeast arm of Uyak Bay): All

waters of Spiridon Bay south of 57 degree 37 minutes 6 seconds north latitude.

(h) East Arm, Uganik Bay, Kodiak Island: All waters within the arm south of a line extending from Mink Point northeasterly to a point on the northeast shore at 57 degrees 43 minutes 20 seconds north latitude.

(i) Terror Bay: All waters within the bay south of 57 degrees 44 minutes north latitude.

(j) Pasagshak Bay, at entrance to Ugak Bay: All waters within the bay.

(k) Ugak Bay: All waters within the bay west of 152 degrees 49 minutes west longitude.

(l) Kiliuda Bay: All waters of the bay west of 153 degrees 7 minutes west longitude.

(m) Old Harbor, Sitkalidak Strait: All waters within 1 statute mile of the mouth of the stream approximately 1 statute mile northeast of Old Harbor, Sitkalidak Strait.

(n) All bays of Afognak Island: All waters of the bays within lines indicated by markers erected for the purpose.

(o) Kaflia Bay, on north shore of Shelikof Strait: All waters within 1 statute mile outside the entrance of the outer lagoon.

(p) Little River, west of Cape Ugat: All waters within 1 statute mile of the mouth of the stream.

(q) Kizhuyak Bay: All waters within one-half mile of the mouth of an unnamed stream entering the bay at approximately 57 degrees 49 minutes north latitude.

(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32′ 30″ N., thence northeasterly along said shore to a point 57° 39′ 40″.

The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative.

U. S. DEPARTMENT OF COMMERCE, BUREAU OF FISHERIES. *STATISTICAL REVIEW OF THE ALASKA SALMON FISHERIES.* PART II: CHIGNIK TO RESURRECTION BAY; BY WILLIS H. RICH AND EDWARD M. BALL. FISHERIES DOCUMENT NO. 1102. PAGE 664.

KARLUK RIVER DISTRICT

This district embraces a small section of the west coast of Kodiak Island in which the seining grounds at the mouth of Karluk River and those adjacent at Slide, Waterfall, and Tanglefoot, constitute one of the most compact fishing areas in all Alaska. Karluk River, a fine clear-water stream, is the outlet of Karluk Lake and the streams of its drainage basin, and is approximately 30 miles in length. It empties into a lagoon or estuary formed by the action of surf and tide which have thrown a high sand and gravel spit across the mouth of the river. This lagoon is about 3 miles long, and in the early days was the preferred seining ground, as operations could be carried on there without interruption by storms and heavy surf.

Although other species are taken in the fishery the remarkable red-salmon runs are of predominant importance. Both the river and the lake are relatively small, yet the abundance of red salmon is so great as to indicate that conditions are particularly favorable for this species. No other stream of similar size is known to produce such large runs, and there are only a few larger streams, such as the Fraser and the Kvichak Rivers, that have been more productive. Occasionally large runs of pinks have appeared and the three other species are taken in significant though much smaller numbers.

In the eighteenth century, Russian explorers discovered and reported great runs of salmon at Karluk, and the Indians, of course, knew of them long before the Russians came. It is a matter of record that 300,000 red salmon were prepared as "yukola" (dried without salting or smoking) in several seasons more than a century ago.[8] Yet no commercial use seems to have been made of the Karluk salmon until after Alaska was purchased by the United States

[8] Sketches from History of American Orthodox Ecclesiastical Mission, Kodiak Mission, 1837-1894. Published by Monastery of Valaam, St. Petersburg, 1894. Translation by N. Gray, Kodiak, Alaska, 1925.

in 1867. The first cannery was built on Karluk Spit in 1882, and for six seasons this one plant operated without competition. The catches increased from 58,800 in 1882 to 1,004,500 in 1887, each intervening year showing a material gain over the preceding. It seems very probable that every salmon captured in these six years was taken in Karluk Lagoon, as fishing on the outside beaches was not engaged in until the competition incident to the establishment of more canneries forced such action.

In 1888, the number of canneries increased to 4, of which 3 were located at Karluk and 1 at Larsen Bay, and the catch amounted to approximately 2,781,000. In the next year, 2 additional canneries were opened and the combined catch of the 6 plants was 3,412,000, no part of which is presumed to have been made elsewhere than at Karluk River. In 1890, the catch was 3,149,000 without change in the number of canneries. The catch in 1891 was 3,500,000, with 6 canneries still in operation. From 1892 to 1895, a period of four years, the number of canneries varied from 3 to 5, and the catch varied from 2,056,000 in 1895 to 3,350,000 in 1894. In all these years no record was made of the number of salmon caught, but the catch has been computed from the reported pack in each year at the rate of 14 fish per case.

SKETCHES FROM HISTORY OF AMERICAN ORTHODOX ECCLESIASTICAL MISSION, KADIAK MISSION 1794 1837. PUBLISHED BY MONASTERY OF VALAAM, ST. PETERSBURG, 1894. TRANSLATED AND COPYRIGHTED BY N. GRAY, KODIAK, ALASKA, 1925.

SUPPLEMENT II.

From the manuscript of Fr. Gedeon, priest-monk of the Alexandro-Nevski cathedral.

(exact copy)

1804. June 8th.

. . . . . .

Besides the above settlement there are on Kadiak the following ARTELS: (outlying settlements)

. . . . . .

(5th). KARLUTSKAYA ARTEL on the North side of Kadiak —On an elevation near KARLUK River the fortress is surrounded by an earthen bulwark from the sea side—27

fathoms long, and from the other three sides 50 fathoms long. In the fortress are the following structures: a fairly clean light barracks made of boards, banked up with sod, 7 fathoms long and four fathoms wide with eleven bunks for Russian promishleni, an apartment for bidarstchik and above two summer apartments, entrance hall, kitchen, a balagan 8 fathoms long by four fathoms wide. Here in good seasons are prepared up to 300,000 yukola. There are two barabaras, one for food stuffs of which there were 200 baskets sarana, 20 barrels shiksha of 25 vedros each, three vats whale oil and two barrels moroshka, the other barabara for storing various articles; a cellar for potatoes and turnips, a summer kitchen, bath-house, a shed for work, and watch-house; beyond the fortress not far from the gate, a cattle barn, hayloft, pig pen, a square kazhim with a hut of three fathoms long for the laborers, of which there are at this artel 20 males and 18 female laborers besides 25 women for cleaning fish, gathered from various settlements. At the foothill, a shed for bidarahs and bidarkas.

Besides these Kadiak artels there are two on Afognak island with similar buildings and establishments; there is one artel on Woody island where no yukola is prepared because there is not a stream there. On this little island they make bricks and boil out salt. At each of the artels they have cattle and vegetable gardens, where they plant potatoes and turnips.

DEPARTMENT OF THE INTERIOR, CENSUS OFFICE, REPORT ON POPULATION AND RESOURCES OF ALASKA AT THE ELEVENTH CENSUS: 1890, G. P. O. 1893. PAGE 79.

THE SECOND DISTRICT.

The Karluk river became known to the Russians as the most prolific salmon stream at an early date, and they utilized it as a depot for supplying their numerous hunting parties with dry fish as early as 1793. Ever since that time that wonderful little river has been made to yield its annual quota for the subsistence of Alaskan people. Salting salmon was not begun here until the middle of the present century, and then only for local supply. With the advent of the Americans the salting of Karluk salmon for the market began upon a limited scale at first, and it was only within the last decade that the California capitalists had

their eyes opened as to the possibilities of this industry and that canneries were erected, of which there are now 5 upon the narrow gravel spit which separates the river from the bay for half a mile. Each of these canneries is fitted with the latest improvements in appliances and machinery, and each can put up from 40,000 to 50,000 cases in a season. During the season of 1890, when the fishermen at Karluk were paid a bonus on each fish caught, the accounts footed up considerably over 3,000,000 fish. The season or "run" extends from June until the beginning of September, but it is interrupted at various times by "slack intervals", lasting from 1 to 2 weeks.

In 1890 the fishing gangs of these 5 canneries were increased by others from the Arctic Packing Company at Uyak and from the Royal and Russian-American Packing Companies of Afognak, and during that whole season nearly 1,000 fishermen, in gangs of 24, could be seen lounging on the beach awaiting their turn to haul the seines, which was determined by lot. Since that time all the Karluk canneries and those of Alitak, Uyak, and Afognak have formed a combination, and have agreed to jointly employ 160 fishermen at Karluk, the fish to be divided pro rata among the firms. Steam tenders carry the fish from all outlying stations to Karluk.

The population of the place in 1890 was over 1,100, but only 180 of these were creoles and Eskimo, permanent residents of the village. A majority of the males and many of the females among the permanent residents are employed in the canneries as fishermen or fish cleaners, receiving good wages. During the winter considerable trapping is done for foxes and land otters, and altogether the Karluk people may be described as fairly prosperous.

The buildings belonging to the fishing firms quite cover the gravel spit referred to above, presenting a very respectable appearance. Each firm has its superintendent's residence, mess house, bunk house, blacksmith and carpenter shop, Chinese quarters, cannery proper, warehouse, cooper and boxmaker shop, and many also a trading store, while both bay and beach are fairly covered with steam launches, fishing dories, lighters, and boats of all kinds. Farther offshore moorings are laid down for the larger craft, the ships, barks, and steamers which carry the pack to San Francisco, and lastly quite a fleet of steam tenders for local traffic. In the height of the season "Karluk spit", as the fishermen call the place, and the roadstead and strait

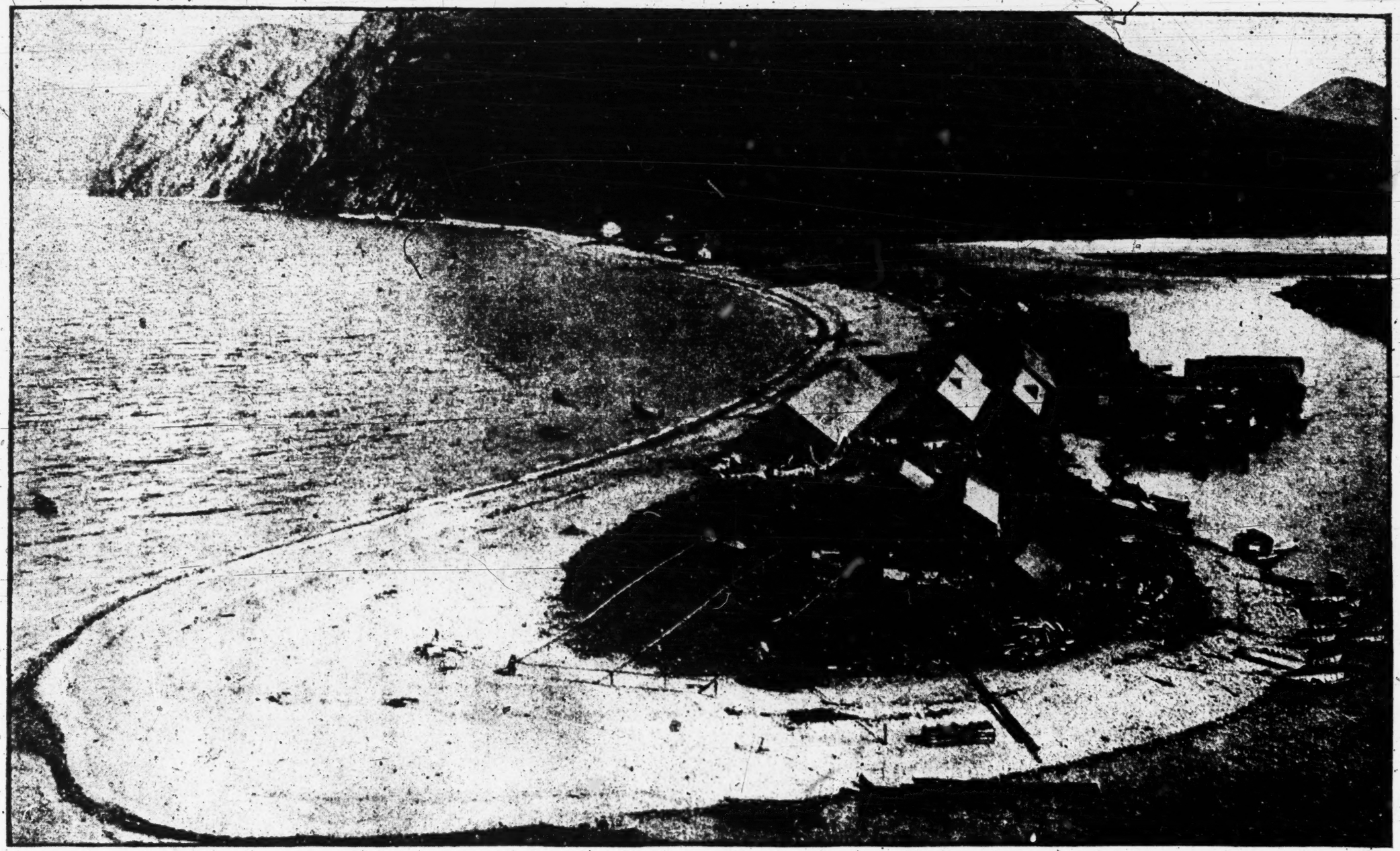
adjoining, present a scene of the greatest activity and animation.

The native settlement is now confined to the left bank of the river, opposite the canneries. It consists chiefly of "barabaras" or sod huts, but owing to the prosperous condition of the people the interior of these humble homes present the comforts and many of the luxuries of a more civilized existence. Upon the bluff overhanging the village stands a neat little chapel of the Russian church, erected by the people, and not far from it the United States government has built a handsome schoolhouse and teacher's residence.

Indications of precious minerals have been reported at various points in the vicinity of Karluk, but as far as known no steps have thus far been taken to develop any of the deposits.

SECOND OR KADIAK DISTRICT

Villages	Total	Male	Female	Native	Foreign	Race and Color													
						White			Mixed			Indian			Mongolian			All Other		
						Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
The district	6112	4398	1714	2294	3818	1105	1056	49	784	407	377	2782	1494	1288	1433	1433		8	8	
Karluk	1123	1034	89	162	961	391	391		20	12	8	167	86	81	542	542		3	3	



KARLUK SPIT.